IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 301

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi,

Petitioners,

vs.

THE CONGRESS OF RACIAL EQUALITY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi,
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THE CONGRESS OF RACIAL EQUALITY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

C. H. Douglas and Mrs. Aubrey McGehee, appearing in her own proper person and as representative and next of kin of her husband, Aubrey McGehee, deceased, two of the Appellees in the Court of Appeals below, and R. Gordon Burt, Jr., the newly elected and qualified Mayor of McComb City, Mississippi, pray that a Writ of Certiorari issue from this Honorable Court to review the judgment and order of the United States Court of Appeals for the Fifth Circuit hereinafter set out in Section B of this petition.

A.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported in F.2d . A copy of said opinion is appended.[1]

B.

JURISDICTIONAL GROUNDS

(i) The judgment sought to be reviewed was dated the 15th day of May, 1963 and was entered on the same date. The judgment was issued as the mandate of the Court of Appeals to the District Court on the 10th day of June, 1963. A copy of said judgment is appended.[2]

(ii) No petition for rehearing was filed and no order respecting a rehearing was entered. No order granting any extension of time within which to petition for certiorari was sought or entered.

(iii) This court has jurisdiction to review the judgment in question by writ of certiorari under the provisions of 28USC § 1254(1) and § 2101(c).[3]

C.

QUESTIONS PRESENTED

1. Are the guarantees of First Amendment to the Constitution so absolute as to require a Federal Chancellor to await an actual physical breakdown of local police and peacekeeping authority before exercising his discretionary

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1. See Appendix, Page A8.
2. See Appendix, Page A6.
3. See Appendix, Pages A1-A3.

authority to partially restrict further or continued demonstrations against local customs and practices?

2. Does the judgment of the Court of Appeals for the Fifth Circuit abridge Rule 52(a)[4] of the Federal Rules of Civil Procedure and in conflict with this court's decisions in *U. S. v. National Association of Real Estate Boards*, 339 U.S. 485, 70 S. Ct. 711, 94 L. Ed. 1007 (1950); *U. S. v. E. I. DuPont de Nemours & Co.*, 351 U.S. 377, 76 S. Ct. 994, 100 L. Ed. 1273 (1955); *International Boxing Club v. U. S.*, 358 U.S. 242, 79 S. Ct. 245, 3 L. Ed. 2d 279 (1959)?

3. Is the judgment of the Court of Appeals contrary to this court's decision in *Hague v. C.I.O.*, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939)?

D

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Because of the length of the provisions involved, their citation alone is set out at this point and their pertinent text is set forth in the appendix.[5]

The Constitution of the United States:

Amendment I.
Amendment IX.
Amendment XIV.

United States Code:

Title 28, § 1254(1), Certiorari Jurisdiction
§ 2101(c), Review on Certiorari.
§ 1332, District Court Jurisdiction.

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4. See Appendix, Page A5.
5. See Appendix, Pages A1-A5.

§ 1343(4), District Court Jurisdiction.
§ 1291, Court of Appeals Jurisdiction.
§ 2072, Rule Making Authority.
Title 42, § 1985(2) and (3), Conspiracy to Interfere with Civil Rights.

Federal Rules of Civil Procedure:

Rule 52 (a).

F.

STATEMENT OF THE CASE

1.

Jurisdiction

Jurisdiction was vested in the court of first instance under Title 28, *U.S.C.*, § 1332.

There was a diversity of citizenship between petitioners, who are citizens of the State of Mississippi, and THE CONGRESS OF RACIAL EQUALITY, which is a corporation incorporated under the laws of the State of New York. All of the proof by way of verified pleadings, affidavit and oral proof indicates that the John Doe defendants who were never served with process were citizens of states other than Mississippi.

The Complaint alleged wilful, intentional, deliberate action on the part of the defendants. These allegations would certainly support a claim by petitioners for punitive as well as actual damages under their prayer for general relief. In this status of the pleadings, a good faith claim was presented which met the jurisdictional amount requirement. *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938).

The court of first instance also had jurisdiction of this cause under Title 28, *U.S.C.*, §1343. Title 42, *U.S.C.*, §1985(2) and (3), is violated whenever two or more persons conspire for the purpose of depriving any person directly or indirectly of the equal protection of the law or of equal privileges and immunities under law, and whenever they so conspire to prevent or hinder the duly constituted authorities of a State from giving or securing such equal protection of the laws to all persons under their jurisdiction. The respondent corporation was charged with formulating and carrying on a plan to foment violence and breaches of the peace in McComb to attract attention to itself. The proof is abundant and uncontradicted that their activities did actually hinder the rule of law in McComb to the detriment of petitioners.

District courts have original jurisdiction of any action authorized under §1985 of Title 42, *U.S.C.*, to recover damages or to secure equitable or other relief. Title 28, *U.S.C.*, §1343(4).

The utilization of a Writ of Injunction to protect rights encompassed within Title 42, §1985 (2) and (3) has been approved. *Brewer v. Hoxie School District*, (C.A. 8th, 1956) 238 F.2d 91.

2.

Pleadings and Proceedings

Petitioners filed a sworn complaint on the 2nd day of December, 1961 (T. 2), alleging that the Respondent, The Congress of Racial Equality—CORE, *a corporation incorporated under the laws of the State of New York*, was sponsoring, financing and encouraging persons to come to McComb City, after publishing their intention so to do, in order to foment violence and provoke breaches of the peace

in and around the bus and rail terminal facilities in McComb City.

On the same date Petitioners moved the Court for the issuance of a Temporary Restraining Order Without Notice (T. 8). This motion was supported by the affidavit of William A. Wiltshire (T. 11). The affiant, who was the City Attorney and a resident citizen of the municipality, averred that persons named therein who had been identified in the press, radio and television media as members of CORE, had come to the Greyhound Bus Terminal and, after giving false information as to their plans, appeared at the bus station in the presence of a belligerent crowd approximately one-half hour earlier than the police were advised they would. He further averred that while these persons were in the terminal they unnecessarily, rudely and violently beat upon the counter of the restaurant in the terminal and spoke and shouted in loud and boisterous language and that their actions provoked a breach of the peace therein. Affiant stated that these actions were done with the knowledge and intent of creating disturbances and provoking violence and breaches of the peace in the absence of police officials (T. 12).

A temporary restraining order enjoining the Respondent Corporation, CORE, from continuing to sponsor, finance or encourage persons to utilize the terminal facilities for the purpose of fomenting violence and provoking breaches of the peace in or near said facilities, was issued at 4:00 o'clock p.m. on the same date by District Judge Sidney C. Mize (T. 15).

On the same date Petitioners filed a Motion for Preliminary Injunction noticing the same for hearing on Thursday, December 7, 1961 (T. 7), at which time it came on to be heard.

At the commencement of the hearing on the Motion for Preliminary Injunction on December 7, 1961, Respondent filed (1) a Motion to Stay because of the pendency of the three-judge Federal Court action in *United States v. Mayor and Selectmen of McComb City*, Civil Action No. 3215 in said District Court (T. 21); and (2) an application for the convening of a statutory three-judge court pursuant to §§ 2284 and 2325 of Title 28, *U.S.C.* (T. 23).

During the course of the hearing on the preliminary injunction, Petitioners called five witnesses on direct examination and called Thomas Gaither, a salaried field representative of the Respondent Corporation, for cross-examination as an adverse witness. The affidavit of William A. Wiltshire was also introduced in evidence under a ruling reserving to the Respondent the right to call Wiltshire, who was present in the courtroom, for cross-examination (T. 54). At the conclusion of Petitioner's proof, CORE offered no proof but filed two additional unsworn motions and rested (T. 215). One was a Motion to Dismiss the proceedings for failure to state a claim upon which relief could be granted (T. 17); the other was styled, "Motion to Dissolve Temporary Restraining Order and Statement in Opposition to Motion for Preliminary Injunction" (T. 25). Both these motions attacked the court's jurisdiction and alleged the injunction prayed for would abridge constitutional liberties and be a burden on interstate commerce.

Only routine appellate procedures of briefs and oral argument occurred in the Court of Appeals. That Court's judgment and mandate is appended.[6]

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6 See Appendix, Page A6

3.

Statement of Facts

McComb City, Mississippi, has a population of approximately 14,500. In November, 1961, it employed a total of fifteen active police officials on all shifts (T. 59). On the 28th day of November a Preliminary Injunction was served on the City in Civil Action No. 3215, *United States v. Mayor and Selectmen of McComb City* (T. 59). On the same date, Jerome Smith, the "Chairman of the New Orleans CORE" telephoned Thomas Gaither, the field representative of the corporation in Jackson, Mississippi, to inform him that a New Orleans CORE group would travel to McComb by bus (T. 159). On Tuesday evening, November 28, 1961, Jack Quigley, an Agent of the Federal Bureau of Investigation, called George Guy, the Chief of Police of McComb, Mississippi [a police officer of 25 years' experience (T. 209)], and told him that CORE was planning to send a group of people to the McComb bus terminal from New Orleans (T. 204, 5). The group of which Jerome Smith was a member arrived in accordance with Mr. Quigley's information (T. 205). Three hours before the arrival of Jerome Smith and his group radio, television and newspapers had announced their anticipated arrival (T. 68) and during the early part of that morning a number of newsmen had come into McComb from as far away as Atlanta, Georgia (T. 69, 70). Prior to the time of the Smith group's arrival a gas leak developed in the cafe in the bus station and it had been cleared of people (T. 73), but there were groups of people standing at some distance East and West of the Bus station (T. 73). When Smith and the others with him debarked from the bus they found the station closed and departed without incident (T. 74). Officials of the McComb Police Department were present

and had the crowd under control that morning (R. 76). The crowd was composed of members of both the white and negro races (T. 77). At about 2:00 p.m. on Wednesday, November 29, a disturbance occurred at the bus station involving a photographer (T. 75). During the progress of the investigation of that event, Federal Agent Quigley again contacted Chief Guy (T. 206) and advised him that he had been in touch with the Jerome Smith group and that they would go to the bus station at 3:20 or 3:25 p.m. and catch the 3:30 p.m. bus out of McComb (T. 207). When Agent Quigley talked with Chief Guy, the Chief advised him that he planned to have his police force present at the bus station at the time the Smith group planned to return (T. 210, 214, 5). Shortly before 3:00 p.m. Agent Quigley returned to the City Hall and advised Chief Guy that there had been a fight at the bus station and Chief Guy went there immediately. He found that the Smith group had come back about a half hour prior to their announced schedule (T. 207).

Immediately prior to the arrival of this group, Mr. McGehee, the operator of the restaurant in the Greyhound Terminal, was sitting outside of the restaurant talking to a man who identified himself to McGehee as a Television Cameraman from Station WDSU (T. 137). During the conversation, the Cameraman jumped up and ran to the corner where some negroes (the Smith group) were getting out of a car. He walked with them to the terminal. As the group started to go in the East door, which was formerly designated the colored waiting room, the cameraman motioned them to the other door on the West side, which was formerly the white waiting room, and told the Smith group to go into that door (T. 138).[7] McGehee

[7] All signs indicating any racially segregated use of the terminal had been removed previously in accordance with the Court's injunction in Cause No. 3215.

followed the group into the terminal building when they entered. They took seats at a counter and began to beat and knock on the counter and loudly demand service. One female in the group said loudly and fractiously (T. 144), "*Why in the hell can't we get service in here?*" The police were not present but another group of people were inside the terminal. McGehee thought violence would ensue (T. 142). He requested the Smith group to cease their agitation and to go to the other side of the terminal, that formerly had been designated as the "colored" waiting room (T. 141). At this point other persons in the terminal physically attacked the Smith group (T. 142).

When the police arrived, with the help of a loud speaker system, they brought the racially mixed crowd at the bus station under control. The crowd obeyed the orders of the police reluctantly, but without further fisticuffs or scuffling (T. 77). The Chief of Police and the Police Commissioner of the City attempted to locate the Smith group in order to secure aid in identification of the persons involved in the disturbance but the Smith group could not be found at that time (T. 85). Later that day, at about 6:00 o'clock p.m., they were contacted by the police but refused to prefer charges. The police continued to investigate the disturbance and subsequently arrested four men in connection therewith at about noon the next day (T. 86).

For months prior to this incident members of the negro race had used the part of the terminal facilities designated for the use of whites without violence (T. 143, 4). There had been racial disturbances between members of the white and colored races with regard to public schools in McComb prior to the time of this CORE-sponsored bus station incident, but CORE had received no publicity in connection with those situations (T. 169). On Wednesday

afternoon or Thursday morning (T. 126), Mayor Douglas talked with Assistant United States Attorney General Burke Marshall (T. 128) and told him that the City had decided it might be a violation of the injunction issued against them to place an officer inside of the station. Marshall nevertheless encouraged him to take this action (T. 129). In the course of their conversation, the Mayor said to Marshall, "If we can have these *publicized* movements discouraged and discontinued, it will be a lot of help to us in maintaining and keeping peace and order." "If Washington will use their influence, or what influence they have, to discourage that, it will be helpful." In reply to which Assistant Attorney General Marshall stated, "I'll do that today and call you back." In a return call Assistant Attorney General Marshall advised that he had had a telephone conversation with CORE's headquarters and that they had promised to discontinue these *publicized* movements (T. 131, 2). Evidently Marshall had also contacted CORE's Jackson field representative because that representative, Thomas Gaither, had given Jerome Smith of New Orleans the telephone number of Marshall in Washington, D. C. (T. 172). On Thursday, November 30, Assistant Attorney General Marshall anomalously wired the Mayor that his interpretation of the Court Injunction did not prohibit the McComb Police from patrolling the bus station premises, *provided their presence did not "have the purpose or effect of coercing racial segregation."* (Defendant's Exhibit #1) (T. 218). The City then decided to take the risk of placing uniformed policemen inside the terminal (T. 129). Correct compliance with the injunctive order was a matter of serious concern to the governing officials of McComb (T. 104, 123).

During the day on Thursday, the Associated Press Wire Service carried stories to McComb that the Smith

group, upon their return to New Orleans, engaged in meetings there and several of them were quoted in press interviews as stating that they planned to return to McComb on Friday from New Orleans on the 10:19 a.m. bus and from Baton Rouge on the 1:30 p.m. bus (T. 79). At approximately 11:00 a.m. Thursday morning, Gordon Carey, the National Field Director for CORE in New York called Gaither, the corporation's Field Director in Jackson, and instructed him to go to the Greyhound Station in McComb on Friday to meet expected bus passengers (T. 172, 3). Upon his arrival in McComb, Gaither called Doris Castle, a member of "our New Orleans CORE Group" to get the details of the time of arrival of the passengers he was supposed to meet (T. 175).

On Friday, Gaither went to meet the 1:30 p.m. bus and at his request the Assistant Chief of Police of the McComb Police Force reserved a place convenient to the station for Gaither to park. Chief Guy offered him an escort. Although Gaither testified that he had some fears or apprehensions for his safety, he stated that they were not due to anything on the part of the police—that his fear came from the presence of the crowds near the station (T. 179). When the group arrived they "used the facilities at the McComb bus station," then went to a restaurant to get something to eat, got back on the bus and left without incident (T. 185, 186).

On Saturday, Gaither again went to the bus terminal to pick up bus passengers. The evidence is conflicting as to whether any disturbance occurred in the terminal building (T. 190, 195-197). The evidence is also conflicting as to the extent of a disturbance at Gaither's car. He states there were several blows struck against the car for a matter of a minute until a police officer heard the disturbance and came to the car and stopped it (T. 190).

Officer Smith stated that only one blow was struck against the car and that he immediately went to the scene and told the person to move on. *The evidence shows without dispute that the city officials and police gave the best possible protection to the agitators during the entire period of the demonstrations. Neither the police nor any city official ever enforced or attempted to enforce racial segregation at or near the terminals and no race based orders were ever directed to those in or near the areas of disturbance, rather, the only function of these officials was to attempt to keep the militant crowds under control and to keep peace and order.* Except when they were misled as to arrival time, the police allowed the demonstrators the free use of the terminal facilities and kept the crowds away from them (T. 76-78, 89-90, 94, 129-130, 214-215).

The McComb Police Force had never had any difficulty in keeping peace and good order in McComb in the past (T. 213). During the period from Tuesday, the 28th day of November, 1961, until the issuance of the Temporary Restraining Order, in the words of the witness, Gordon, a newsman, and the City's Police Commissioner: "The people of the City were obviously greatly disturbed. They were reluctant to go about their ordinary business. The situation was extremely tense, explosive." (T. 92). Business in general in the community was seriously affected (T. 122) and Mr. and Mrs. McGehee were forced to abandon and close their private restaurant business (T. 146).

By Friday of the week of the demonstrations it was found necessary to increase the size of the police force (T. 213); by then every local policeman was on duty except one (T. 213). Off-duty policemen were used for extra duty on a double time basis until the Temporary Restraining Order took effect (T. 132, 3). Sheriffs, Deputy Sheriffs and State Highway Patrolmen had joined in as-

sisting the local police, which was a very unusual situation (T. 96). In the Police Commissioner's opinion, continued *publicized* demonstrations and agitation would have resulted in "chaos" and an "intolerable burden" would be placed on the local police force (T. 97).

The continuous burden placed on the City's small police force by these widely publicized agitations and demonstrations had existed for four days and nights before tensions were lifted by the District Court's Temporary Restraining Order required a temporary respite in *publicized* demonstrations and agitation. When the Temporary Restraining Order was issued the tense and explosive atmosphere in the community which had required 24-hour police surveillance, was tremendously improved (T. 95, 122), *although members of the negro race continued to use the terminal facilities* (T. 95).

F

ARGUMENT

Preliminary Statement

The fact subject matter of this petition includes the area of race relationships in Mississippi. One would be naive in the extreme to suppose that this issue does not provoke intense, albeit sometimes varying, reactions from the jurist as well as the ordinary man in the street. Petitioners feel it is imperative at the outset to state that the questions presented by this petition are *not* questions of segregation or unconstitutional racial discrimination or distinctions. The basic issues are (1) When does the government's peace-keeping responsibility permit the partial, temporary suspension of continuous demonstrations which have provoked burdens that threaten to exhaust its peace-keeping ability?; and (2) Does this court intend

to overrule its decision in *Hague* v. *C.I.O.*, *supra*, and create a new hybrid type of reverse derivative right in corporations to assert first amendment protections of individuals?

The fact that these issues arose against a background of racial unrest does not alter the basic legal issues.

I.

No Unconstitutional Abridgement of First Amendment Rights Resulted from the Issuance of the Preliminary Injunction

Although Petitioners respectfully submit that an examination of the record in this case discloses that the findings of fact by the District Judge were amply supported by the evidence and the logical and reasonable inferences to be deduced therefrom, no resolution of fact which is in dispute between the District and the reviewing court affects the legal error committed by the appellate court. (For convenience, the District Judge's order is appended hereto.[8]) Two judges of the Court of Appeals, after review of the cold record, held that this Federal Chancellor, who not only heard and observed the witnesses but was closest to the background and circumstances against which these agitations were cast, and who best knew, of any member of the Federal Judiciary, the realities of the racial situation in this community, had abused his discretion in granting a *very limited* preliminary injunction. He temporarily enjoined a corporation from continuing its sponsorship of the *publicized* use of rail and bus terminals in a beleaguered small town *after four consecutive days* of demonstrations which were accompanied by breaches of the peace, tension and intense peace-keeping difficulty.

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8. See Appendix, Page A37

The Circuit's majority opinion redetermined certain of the trial judge's preliminary findings of fact and came to the conclusion from "the whole record" that they would have acted differently if they had been invested with original and not appellate jurisdiction. The dissenting Court of Appeals' judge has completely documented the record facts upon which the district judge's opinion was based and, except to refer to this documentation, it will not be further discussed, because the stated differences in fact resolution do not control the legal issues.

With deference, we submit that the majority judges incorrectly interpreted this court's decision in *Edwards v. South Carolina*, No. 86 (Feb. 25, 1963) U.S. , 83 S. Ct. 680, L. Ed. , and took it to control the legal questions presented here.

With regard to the limited Preliminary Injunction, they stated:

> "We find that the injunction below is an unconstitutional abridgement of the First Amendment rights, as protected by the 14th Amendment, as a prior restraint on the freedom of speech . . .
>
> "The injunction, if allowed to stand, would amount to a *complete* deterrent to the members of CORE to peacefully demonstrate against the segregation policies of the City of McComb. (Emphasis added)
>
> "CORE and other organizations, organized for the purpose of peacefully demonstrating and speaking against unconstitutional state and local laws enforcing segregation would find themselves virtually inarticulate."

A word by word review of the entire record in this cause fails to furnish any basis for the last two statements. Nowhere is the purpose of the corporation, CORE's, organization even touched upon.

Agitators, who were encouraged by CORE to come into the City of McComb, came for the publicly announced purpose of using terminal facilities which had been in use on a racially integrated basis for many months prior to their arrival, and this integrated use continued uninterruptedly after the issuance of the injunction. The Preliminary Injunction Order specifically exempted travel for any lawful purpose and required the use of any facility at the terminal without regard to the race or color of the traveler. It simply temporarily lifted an intolerable burden which threatened the immediate breakdown of peace and order in an entire city from the shoulders of a small police force *after* long continued demonstrations had been protected to the best of the police force's ability. If there was ever a time when a point of clear and present danger had been reached, it was evidenced by the record in this case. But such a record is not necessary to constitute error on the part of the appellate review court. Actually, the purpose of a preliminary injunction is not to decide or prejudge the merits but to preserve the status quo until the rights of the parties may be fully determined by trial. *Miami Beach Fed. Savings & Loan Assn.* v. *Callender*, (5th Cir., 1958) 256 F.2d 410; *Weiner et al.* v. *National Tinsel Manufacturing Co.*, (7th Cir., 1941) 123 F.2d 96; cf. *Mayo* v. *Lakeland Highlands Canning Co.*, 309 U.S. 310, 60 S. Ct. 517, 84 L. Ed. 774. (1940). The proof is not required to be complete enough to demonstrate the right to a decree after trial in order to justify preliminary injunctive relief. *Duckworth* v. *James*, (4th Cir., 1959) 267 F.2d 224, cert. den. 361 U.S. 835; *Burlington Mills Corp.* v. *Roy Fabrics*, (D.C., S.D., N.Y., 1950) 91 F. Supp. 39, aff. (2nd Cir. 1950) 182 F.2d 1020.

Preliminary injunctive relief is available from a Court of Equity to maintain the status quo by restraining an act

contrary to equity and good conscience, especially when it is demonstrated that the applicant will be irreparably injured in the absence of such relief. *Beacon Theatres, Inc., v. Westover*, 359 U.S. 500, 506-7, 79 S. Ct. 948, 3 L. Ed. 2d 988, (1959). Injunctive relief may be granted to prevent the improper or illegal use of public places. 43 *C.J.S.* 762-65, Injunctions, §§ 151-3 (cf. *U. S.* v. *Wood et al.*, (5th Cir., 1961) 295 F.2d 772, where a presumptively valid state criminal prosecution was enjoined by this same circuit because it would possibly have adverse effects on members of a community).

The public interest carries a great weight in the balance scale which the court is required to use in determining whether to grant or to withhold preliminary injunctive relief. 7 *Moore's Federal Practice* 1627, 8. Where grave questions are presented and injury to the complaining party would be certain and irreparable if the motion was denied and a final decree would be found not in favor, while the injunction, if it be granted, would not cause any considerable injury to the opposing parties, the injunction ought to be granted. *Meccano, Ltd., v. Wanamaker*, 253 U.S. 136, 141, 40 S. Ct. 463, 64 L. Ed. 822 (1920); *City of Miami Beach* v. *Benhow Realty*, (5th Cir. 1948) 168 F.2d 378.

With deference, we submit that the majority judges in the Court of Appeals not only were factually incorrect in their assessment of the record but were legally incorrect in making a redetermination of the facts, in view of the above authorities. This was certainly not the same situation as was presented in the *Edwards* case, *supra*. In the *Edwards* case *the first* demonstration was *in progress* on the grounds of the capitol where the legislature was convened when the *police*, acting under a *statute*, moved into halt the demonstration *entirely*. The only analogy to this

present matter was the fact the imminent threat to peace and order came from another group which resented the existence of the demonstration.[9]

After the lengthy period of continuous tension, which group threatened overt action was of as little consequence to the sleepless and exhausted police as it was to the legal issues involved.

We respectfully submit that the reviewing court's determination that the injunction constituted a "prior restraint" on free speech or assembly or demonstration or agitation is wholly unwarranted. Not only had this corporation not been restrained from assembling, speaking, demonstrating and agitating, *it had in fact been protected in the very acts of such speech, assembly, demonstration and agitation for four continuous days prior to the time that a Chancellor decreed that certain aspects of such demonstrations should be temporarily suspended.*

This case is unique in other respects. In all prior decisional law where a claim has been made that action amounted to unconstitutional restraint on freedom of speech or assembly, such complaints were bottomed upon the application of inflexible statutes or ordinances with the single exception of *Thomas* v. *Collins*, 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed. 430 (1945). In that case a restraining order was issued, without a hearing, *prior* to the time that the appellant spoke *and the restraining order was based upon the existence of a statutory requirement.* The court ex-

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9. Of course, the two groups had equal constitutional right to hold the personal views which caused the difference of opinion between them, even though neither had any right to break the proper criminal proscriptions on orderly conduct. *Shelly* v. *Kraemer*, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed. 1161, 3 A.L.R. 2d 441 (1948).

pressly confined its decision to the application of the statute.

This court has pointed out what common sense certainly dictates—that the fourteenth amendment's protection, even in first amendment areas, does not prevent the substitution of a Chancellor's Decree for a policeman's club. *Milk Wagon Drivers' Union v. Meadowmoor Dairies*, 312 U.S. 287, 61 S. Ct. 552, 85 L. Ed. 836 (1941). You have also declared that constitutional guarantees are not paramount to those reasonable exercises of the police power that are necessary to promote peace and good order. The court has often recalled the language of Chief Justice Hughes in *Cox v. New Hampshire*, 312 U.S. 569, 61 S. Ct. 762, 85 L. Ed. 1049, 133 A.L.R. 1396 (1941):

> "Civil liberties, as guaranteed by the Constitution imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses."

Claimed violations of First Amendment rights have so often been before this court that it would be presumptuous to burden the court with numerous citations. For ease of reference to some of these cases, pertinent here, we would refer the court's attention to its majority and dissenting opinions in: *Edwards v. South Carolina, supra*, adding only the citation of *American Communications Assn. v. Douds*, 339 U.S. 382, 70 S. Ct. 674, 94 L. Ed. 925 (1950); *Schenck v. U. S.*, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470 (1919); and *Beauharnais v. People*, 343 U.S. 250, 72 S. Ct. 725, 96 L. Ed. 919 (1952). Cf. *Dennis et al. v. U. S.*, 341 U.S. 494, 71 S. Ct. 857, 95 L. Ed. 1137 (1951), wherein the court stated:

> "Nothing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature.

"If the ingredients of the reaction are present, we cannot bind the Government to wait until the catalyst is added."

In *Beauharnais* v. *People, supra*, the court emphasized the necessity for a thorough consideration of the historical background against which events were set in considering whether or not a statutory limitation on speech and assembly would be permitted. McComb City, Mississippi, is a relatively small southern community which, during the entire lifetime of its present residents, had followed the custom and practice of racial segregation. Earlier in the year racial demonstrations involving schools in the community had taken place heightening a tense situation. One day prior to the first of Respondent's actions the police force and officials of the city were enjoined to refrain from any law enforcement activities which might be construed as "seeking to enforce or coerce the segregation of the white and negro races in their use of terminal facilities used in interstate commerce."[10]

News media had exploited the local situation to the fullest. At this time and under these circumstances we submit that by the long continued and highly publicized provocative demonstrations the corporate respondent had finally placed itself outside of the ambit of reasonable free speech. As will be demonstrated below, the corporation, CORE, *which was the only appellant in the reviewing court*, had no constitutionally guaranteed right of speech

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10. In this connection, the city had determined that placing uniformed policemen with badges and guns inside the terminal facilities would constitute action which would be a violation of that injunction. This determination was in full accord with existing decisions of the Court of Appeals for the Fifth Circuit. *Baldwin* v. *Morgan*, (5th Cir. 1961) 287 F.2d 750, 757, and *Meredith* v. *Fair*, (5th Cir. 1962) 305 F.2d 343, 359

or assembly to petition. The trial judge was well within his area of discretion in determining to grant the very limited preliminary injunction.

2.

The Court of Appeals Erred in Substituting Their Judgment for the Judgment of the Trial Court Judge on This Record

A very limited issue presented itself for appellate determination. This was not an issue of the factual merits or demerits of the petitioners' claim for temporary injunctive relief. As demonstrated in argument under Point 1, the trial court was not reaching a decision on the merits of the controversy; it was not making an adjudication of any fact on the merits; it assayed only to make a limited decision as to whether equity required the preservation of the status quo on the basis of the sworn complaint, affidavit and testimony adduced before it. Its preliminary determinations nevertheless came to the Court of Appeals insulated by the provisions of Rule 52(a) of the Federal Rules of Civil Procedure. We respectfully submit that in proceeding to their examination of the record the two-judge majority of the appellate court proceeded to redetermine the record facts and concluded that they would have reached a contrary decision. As previously stated, the errors and omissions in their fact analysis is completely documented by the dissenting circuit judge. We respectfully submit, however, that the majority judges' re-examination of the record as a matter of law conflicts with this court's decisions in *U. S. v. National Association of Real Estate Boards, supra; U. S. v. E. I. DuPont de Nemours & Co., supra,* and *International Boxing Club v. U. S., supra.*

For the very narrow purpose of determining whether a preliminary injunction should issue, we respectfully sub-

mit that the record is replete with fact documentation which supports the lower court's exercise of discretion.

3.

The Rights Protected by the First and Fourteenth Amendments Are the Rights of Natural Persons, Not Artificial Corporations

The only Appellant before the Court of Appeals was the corporation, CORE. This was not in anywise a class action and none of the individual defendants appeared in or appealed from the decision of the lower court. No suggestion was made in the Court of Appeals that any derivative rights were being asserted. In *Hague v. C.I.O., supra*, this court stated:

> "'Natural persons, and they alone, are entitled to the privileges and immunities which §1 of the Fourteenth Amendment secures for 'citizens of the United States'. Only the individual respondents may, therefore, maintain this suit."
>
> * * *
>
> "Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by § 1 of the Civil Rights Act of 1871 to maintain the present suit in equity to restrain infringement of their rights. As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. Northwestern Nat. L. Ins. Co. v. Riggs, 203 U.S. 234, 255, 51 L. Ed. 168, 173, 27 S. Ct. 126, & Ann. Cas. 1104; Western Turf Assoc. v. Greenberg; 204 U.S. 359, 363, 51 L. Ed. 520, 522, 27 S. Ct. 384."

See also *Shelly* v. *Kraemer*, *supra*, footnote 9, *Communist Party* v. *Control Board*, 367 U.S. 1, 81 S. Ct. 1357, 6 L. Ed. 2d 625 (1961); *Adams* v. *City of Park Ridge*, (7th Cir., 1961) 293 F.2d 585; *International Ladies G.W.U.* v. *Seamprufe*, 121 F. Supp. 165 (1954); *The Constitution of the U. S.*, Corwin Ed. 1953, p. 809.

CONCLUSION

This case is cast out of character if it be considered as a segregation controversy. It was long past that; it had devolved itself into a very basic peace-keeping issue and the primary determination which the trial judge was called on to make was whether or not basic constitutional rights of free speech required the officials of this municipality to continue to withstand the heavy peace-keeping burden provoked by these continuous publicized provocative demonstrations, which, at the time injunctive relief was granted, had progressed continuously for four days and were threatening to continue as long as the reaction of local individuals could be provoked.

We respectfully submit that not only was the trial judge's discretion not abused in temporarily calling a halt to the publicity aspects of these demonstrations, but a refusal to have imposed at least this stricture would certainly have been an abuse of his discretion.

This court should grant certiorari and review and set aside the judgment of the United States Court of Appeals for the Fifth Circuit issued the 10th day of June, 1963.

Respectfully submitted,

LOUIS ALFORD,
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Attorney General of the
State of Mississippi,
Jackson, Mississippi,
Of Counsel.

CERTIFICATE OF SERVICE

I, the undersigned, CHARLES CLARK, of counsel for Petitioners, and a member of the Bar of the Supreme Court of the United States certify that a true copy of the foregoing PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT has been mailed air mail, postage prepaid to: Carl Rachlin, 280 Broadway, New York, New York; Derrick A. Bell, 10 Columbus Circle, New York, New York; and Lolis Elie, 2211 Dryads Street, New Orleans,

Louisiana, in accordance with the requirements of the rules of this Court, on this the day of , 1963.

CHARLES CLARK,
P. O. Box 1046,
Jackson, Mississippi.

APPENDIX

The Constitution of the United States

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

Amendment IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

Title 28.

§1254. *Courts of appeals; certiorari; appeal; certified questions.*

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

§1291. *Final decisions of district courts.*

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

§1332. *Diversity of citizenship; amount in controversy costs.*

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

§1343. *Civil rights and elective franchise.*

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

§2072. *Rules of civil procedure for district courts.*

The Supreme Court shall have the power to prescribe, by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts of the United States in civil actions.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

§2101. *Supreme Court; time for appeal or certiorari; docketing; stay.*

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Title 42.

§1985. *Conspiracy to interfere with civil rights—Preventing officer from performing duties.*

Obstructing justice; intimidating party, witness, or juror

(2) If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified, or to influence the

verdict, presentment, or indictment of any grand or petit juror in any such court, or to injure such juror in his person or property on account of any verdict, presentment, or indictment lawfully assented to by him, or of his being or having been such juror; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

Depriving persons of rights or privileges.

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising

any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Federal Rules of Civil Procedure

Rule 52.

FINDINGS BY THE COURT.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

United States Court of Appeals

FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1962

No. 19,724

D. C. Docket No. 3223 Civil

THE CONGRESS OF RACIAL EQUALITY, JOHN DOE and MARY DOE,
Appellants,

versus

C. H. DOUGLAS, Individually and As Mayor of the CITY OF McCOMB CITY, MISSISSIPPI, and MR. & MRS. AUBREY McGEHEE,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.
Before Tuttle, Chief Judge, Wisdom and Gewin, Circuit Judges.

Judgment

(Filed June 1, 1963.)

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the preliminary injunction of the said District Court in this cause be, and

the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to vacate and set aside the preliminary injunction;

It is further ordered and adjudged that the appellees, C. H. Douglas, individually and as Mayor of the City of McComb City, Miss., and Mr. & Mrs. Aubrey McGehee, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Gewin, Circuit Judge, dissents."

May 15, 1963

A true copy

Test: Edward W. Wadsworth,
Clerk, U. S. Court of Appeals,
Fifth Circuit,

By /s/ Clara R. James,
Deputy.
New Orleans, Louisiana.

Issued as Mandate: June 10, 1963

Recoverable Costs:

Docketing Cause $25.00

CORRECTED

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 19724

THE CONGRESS OF RACIAL EQUALITY,
JOHN DOE and MARY DOE,
Appellants,

versus

C. H. DOUGLAS, Individually and As Mayor of the CITY OF McCOMB CITY, MISSISSIPPI, and MR. & MRS AUBREY McGEHEE,
Appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

(May 15, 1963)

Before TUTTLE, Chief Judge, WISDOM and GEWIN, Circuit Judges.

TUTTLE, Chief Judge: This is an appeal from a preliminary injunction obtained by the Mayor, acting individually and as Mayor of the City of McComb City, Mississippi, and Mr. and Mrs. Aubrey McGehee, the owners of a restaurant in a Greyhound Bus Station against CORE forbidding the defendant from sponsoring, encouraging or financing persons to utilize the terminal facilities in the City of McComb City, Mississippi, "for the purpose of fomenting violence or provoking breaches of the peace in

or near said terminal facilities; or for such purpose after having publicized their purposes and intentions to so utilize or misuse such facilities; or for the purpose of creating or securing unto themselves notoriety and publicity, as the sponsoring organization of such fomentation and provocation; or for the purpose of testing the tempers and reactions of the local citizens of the said City in the absence of local police protection."

Jurisdiction was vested in the district court by way of 28 U.S.C. §1332, diversity of citizenship, the Congress of Racial Equality being incorporated in the state of New York, and all plaintiffs being citizens of the state of Mississippi.

On Monday, November 27, 1961, a preliminary injunction was issued by a statutory three-judge court in the Southern District of Mississippi generally enjoining McComb City and its officials from interfering in any way with compliance by the Greyhound Corporation with the laws of the United States and the regulations of the Interstate Commerce Commission prohibiting racial discrimination in interstate commerce facilities. 6 Race Relations Law Reporter 1169.

All of the evidence in this case come from the testimony of the witnesses for the plaintiffs, including a member of CORE, on direct and cross-examination, the defendants not filing responsive pleadings other than motions to dismiss or offering any of its own witnesses.

Since this is an appeal from a preliminary injunction and not a final ruling after full hearing on the merits, we must review the district court's injunction on the narrow question of whether that court abused or improvidently exercised its discretion. *Alabama v. United States*, 279 U.S. 229, 230 (1929); *Weiner v. National Tinsel Manufac-*

turing Co., 123 F.2d 96 (7th Cir., 1941). Unless the plaintiffs make out a prima facie case, a preliminary injunction should not issue. *W. A. Mack, Inc.*, v. *General Motors, Inc.*, 260 F.2d 886 (7th Cir., 1958). An injunction should only be used when it is clear that the question presented by the litigant who seeks the injunction is free from doubt. See *Consolidated Canal Co.* v. *Mesa Canal Co.*, 177 U.S. 296, 302 (1900); *St. Louis St. F. M.* v. *Sanitart St. F. M. Co.*, 161 Fed. 725, 728 (8th Cir., 1908). Furthermore, there must be a balancing of the conveniences and rights of the parties and a balancing of the possible injuries to them according to how they may be affected by the granting or withholding of the injunction. *Meccano, Ltd.*, v. *Wanamaker*, 253 U.S. 136, 141 (1920).

The complaint,[1] the tenor of which is conveyed by

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1. The pertinent parts of the complaint are here set out for easy reference:

"II

"The defendant, Congress of Racial Equality and others associated with them are sponsoring, financing and encouraging John Doe and Mary Doe and others to come into the City of McComb City, after publicizing their intention so to do, in order to foment violence and to provoke breaches of the peace in and around the terminals and facilities used in McComb City for the transportation of passengers, mail and baggage into, through and from the City of McComb City.

"III

"This agitation on the part of John Doe and Mary Doe and others has provoked incidents of violence at the Greyhound Corporation bus terminal in McComb City and was calculated to, did and will continue to provoke future incidents of violence in and around said bus terminal, which said incidents of violence have resulted in great injury and damage to plaintiffs and each of them, and to the City of McComb City, which said damages are in excess of $10,000.00 in amount, exclusive of interest or costs, and are immediate and irreparable.

the language of the preliminary injunction, stated above, claims that such "incidents of violence" which were done in order "to foment violence and to provoke breaches of the peace in and around terminals and facilities", have caused "great injury and damage" to the plaintiffs.

We will examine the evidence, including the inferences to be drawn therefrom, in the light most favorable to the appellees, the winning parties below, in order to determine if the rights of the plaintiffs are "free from

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"IV

"Under and pursuant to a prior order of this court in the case of U.S.A. v. Mayor and Selectmen of McComb City, et al., being Civil Action No. 3215, the police officials and other officials of the City of McComb City have been enjoined from acts which might be construed as interference in any way or by any means with the conduct of the Greyhound Corporation and any and all other persons operating or using said terminals and facilities used in interstate commerce, a true copy of which injunction is attached hereto as Exhibit 'A'.

"V

"The plaintiffs, Mr. and Mrs. Aubrey McGehee, are the operators of the Greyhound Bus Terminal at 206 Canal Street in the City of McComb City, Mississippi, and were, until the acts and activities of the defendants herein forced them to close the same, the operators of a restaurant business in the said Greyhound Bus Terminal building.

"VI

"The acts of the defendants are wilful, intentional, deliberate acts which defendants have publicly announced to the newspaper, radio and television press media that they intend to continue. The defendants will, unless restrained by order of this court, continue to unlawfully sponsor, finance and encourage other persons to come to the said terminal facilities in the City of McComb City for the purpose of fomenting violence and provoking breaches of the peace in or near said terminal facilities in obstruction to and interference with the lawful rights of the plaintiffs, under the Constitution and laws of the United States of America and the State of Mississippi.

doubt"[2] so that this court in reviewing the issuance of the preliminary injunction of the district judge could not say that the district judge abused his discretion.

The testimony discloses the following events: On Tuesday, the day following the issuance of the order of the United States District Court desegregating the terminal facilities of McComb, certain officials of McComb learned that Negro members of CORE were coming from New Orleans to McComb on Wednesday, the next day, in order to use McComb's bus terminal facilities.[3] The members

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"VII

"The plaintiffs have no adequate remedy at law.

"WHEREFORE, Plaintiffs pray this Honorable Court to permanently enjoin the Defendants, their officers, agents, servants, employees and attorneys and those persons in active concert or participation with them, from continuing to unlawfully sponsor, finance or encourage persons to utilize the terminal facilities in the City of McComb City, Mississippi, for the purpose of fomenting violence and provoking breaches of the peace in or near the said terminal facilities.

"Plaintiff prays for such further relief as the interest of justice may require."

2. "There is no power the exercise of which is more delicate, which requires greater caution, deliberation, and sound discretion, or more dangerous in a doubtful case, than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended, unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction." Truly v. Wanzer, 5 How. 141, 12 L. Ed. 88.

This is the standard announced by the same district court for the Southern District of Mississippi in denying injunctive relief to Negro plaintiffs in Clark v. Thompson, 206 F. Supp. 539, 543.

3. There is no dispute about the fact that the actions of the members of CORE in this case were for the avowed purpose of testing the segregation previously practiced in the terminal and recently declared invalid by the Federal District Court.

arrived by bus from New Orleans Wednesday morning, as scheduled, but they found the bus terminal closed because of a "gas leak." Their arrival had been announced by various news media, and small groups of whites and Negroes, as well as a few members of the press, were on hand to "greet" the travelers. They arrived at and departed the closed terminal without incident. Members of the McComb police force were present that morning. That afternoon the same CORE members returned to the terminal, but when they got there none of the McComb police force had yet arrived.[4] The crowd was larger this time. A photographer was reported to have been beaten up at or near the terminal by members of the white throng. The number of persons "greeting" the travelers was never determined, but it was clear that the CORE groups *never numbered over five*. The CORE party went into that part of the terminal restaurant, which was formerly only for whites, and asked to be served. The proprietor, who first told them to go to the other part of the waiting room to be served by a woman of their color, testified that they demanded services and that one of them beat on the counter and said, "Why in the hell can't we get service in here." He further testified that violence broke out, although he said he did not know where it came from. One of McComb's Selectmen, a Mr. Gordon, testified that he saw disturbances on Wednesday, but he too could not be specific. He said there were no breaches of the peace, and no refusal by the McComb citizens to obey the police officers, once they got there, although he said the Negroes were "ejected" from the waiting room.

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4. Testimony was that the Chief of Police was informed that these Negroes would return that afternoon at 3:20, but arrived 30 minutes early, and that this was the reason none of his force was there.

He said the Negroes always behaved in an appropriate manner.

Another visit by these CORE members was planned for Friday. The newspapers carried the story on Thursday. Large crowds were again there to meet them, as well as the police force being on hand. They arrived as scheduled and used the terminal facilities without incident. The McComb Chief of Police testified that to his knowledge the CORE members did not behave in a boisterous manner.

On Saturday another visit was scheduled and again there were some greeters at the terminal site, this time not as many as on the previous visits. The reporters and police officers were also on hand. A police officer, Smith, testified that the CORE members behaved "in a reasonably quiet manner," and that the police had the situation under control Friday and Saturday, but that they were needed there to keep order. There were two reported incidents of disturbance on Saturday. A local member of CORE stated that he was struck several times by some person in the terminal; and the other was that two or three of the members of the crowd struck the local CORE official's car, but this stopped at the command of one of the police officers.

It was clear that the rides were publicized, but there is little evidence to indicate how the press got hold of the planned trips. One of the local CORE officials said that he know of no planned publicity. The city officials originally learned on Tuesday of the first trip from an agent of the F.B.I., although how the latter learned is not disclosed. There is no evidence that CORE itself held press conferences to make public statements about the timing of planned rides.

From the three visits on Wednesday, Friday and Saturday, and the above described events, the testimony was that the city was affected in the following manner: Selectman Gordon: "The people of the city were obviously greatly disturbed. They were reluctant to go about their ordinary business. The situation was extremely tense, explosive." But he said the situation got better after Judge Mize's temporary restraining order. The proprietor of the restaurant said he had to close down his restaurant because of the tense situation, although Negroes have used the terminal facilities peacefully and without incident since the CORE visits.

The evidence relative to the conduct of the CORE members was almost entirely favorable. They behaved in an "appropriate manner," never "antagonistic," never "boisterous," and in "a reasonably quiet manner" according to the testimony of three of the plaintiff's witnesses. Only the proprietor of the restaurant said one CORE member demanded service in a loud manner and beat on the counter. The only incidents of malevolent behavior came from the white crowd milling around the terminal. The police officers testified that the crowds obeyed their orders at all times and that they had the situation under control on Friday and Saturday.

The district court found that the CORE members publicized their arrival, and that this was a "widely advertised challenge to the entire community;" that this was with the avowed purpose of testing and provoking the tempers of the community, and to incite disturbances and violence upon themselves, and to taunt and tantalize the community. The court found that their acts were done to provoke others to attack them and to commit breaches of the peace; that these acts were done only for the purpose of disturbing the domestic tranquility of the community for

the financial gain of the defendants. The court then concluded that the right of the Negroes to freely use the terminal was not at issue. But that right "to use and enjoy these facilities carries with it a corresponding duty to behave themselves while doing so. Even the well-recognized constitutional right of free speech, does not accord an irresponsible person the right to wrongfully holler 'Fire' in a crowded theatre."

We find upon a close study of all the testimony that the record is completely barren of any evidence of an intent by CORE to provoke breaches of the peace, to incite violence, to disturb the domestic tranquility for CORE's own financial gain, to bring violence upon themselves, or to taunt and tantalize the community. In fact, with the exception of the one incident of demanding service by beating on the counter, the testimony disclosed that the Negroes acted in no way hostile, violent or provoking. At all times they behaved in an orderly fashion. Furthermore, there is absolutely no evidence that CORE "widely advertised" its goings and comings. In any event, regardless of what the findings were with respect to the publicity, it is clear that, whatever part of the injunction is based on "advertising" of the comings and goings of CORE, the injunction must be struck down. The publicity, even if provided originally by CORE, could only be said to be a part of their peaceful efforts to demonstrate. Any violence from the local citizenry which comes from this can only be said to be based on the offensiveness to them of CORE's intention to use McComb's facilities on an integrated basis, and their right to publicize their intentions is no less protected that their carrying them out.

Of course, no court may enjoin conduct which is neither threatened nor imminent. Since there was absolutely no

proof that the respondent threatened to do *anything* "*for the purpose of fomenting violent or provoking breaches of the peace*," or "for *such* purpose after having publicized their purposes and intentions to so utilize or misuse such facilities; or for the purpose of creating or securing unto themselves notoriety and publicity, as the sponsoring organization of *such fomentation and provocation*," the fact that the court issued its injunction in these terms must amount to a determination by it that the *acts proven to have been threatened* justified the issuance of the injunction. The record is clear that the acts proven to have been threatened constituted nothing more than a purpose by CORE to continue to test the previously segregated facilities of the bus station in a peaceful manner.

The Supreme Court has recently spoken in a case which clearly controls the one here before us. In *Edwards v. South Carolina*, ——— U.S. ———, 31 U.S.L. Week 4225 (Feb. 25, 1963), the Court reversed the Supreme Court of South Carolina's upholding of the convictions of the common law crime of breach of the peace of 187 Negro students who marched on the South Carolina State House grounds "to submit a protest to the citizens of South Carolina . . . our feelings and our dissatisfaction with the present conditions of discriminatory actions against Negroes, in general, and to let them know that we were dissatisfied and that we would like for the laws which prohibited Negro privileges in this State to be removed. The Negroes marched in small groups through the State Capitol, each group bearing placards of protest, such as "I am proud to be a Negro," and "Down with segregation." The Negroes were warned by the waiting police officers that they would be arrested if they did not

disperse within 15 minutes of the order.[5] Instead of dispersing they sang, clapped their hands and stamped their feet, and listened to a "religious harangue" by one of their leaders. There was testimony that "a dangerous situation was building up" and there was an "imminently threatened disturbance of the peace of the community." A large crowd of white persons had gathered, estimated to be about 300, which had begun to impede vehicular and pedestrian traffic.

In spite of the testimony that the city officials felt that the mob had reached a "fever pitch" and that the demonstrations "tended directly to immediate violence," the Court, upon an "independent examination of the whole record," found that the petitioners had "peaceably expressed their grievances" and "peaceably assembled,"[6] and that "South Carolina had infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances." See also *Field* v. *South Carolina*, —— U. S. ——

Feiner v. *New York*, 340 U. S. 315, is the case heavily relied on by South Carolina in the *Edwards* case and appellees in the case at bar. We find that the facts of this case fit squarely within the factual bounds of the *Edwards* case and fall outside the allowable limitations on First Amendment rights as evidenced in the *Feiner* case.

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5. At first the demonstration was not going to be halted, but according to one city official, when the situation got out of hand and violence appeared to be imminent, he decided that the demonstration should be stopped. This was when the 15 minute directive was given.

6. The Court pointed out that it was not until they were told to disperse on pain of arrest did they do more, and that even then there was no violence or threat of violence on their part, or on the part of any member of the crowd. Furthermore, there was ample police protection.

These cases, and similar others, involve a balancing of First Amendment — Fourteenth Amendment rights[1] with the "power and duty of the state to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents." *Thornhill* v. *Alabama*, 310 U. S. 88, 105 (1940). "It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace." *Feiner* v. *New York*, supra at 321. The Court there upheld the conviction of Feiner for breach of the peace for attempting to arouse the Negro people against the whites, *urging that they rise up in arms and fight* for equal rights. The outstanding difference between this and the *Edwards* case on the one hand and the *Feiner* case on the other is that the element in the latter case of the defendant's *purpose* and *attempts to incite*, and near success thereto, was totally lacking in this and the *Edwards* case.

In view of the facts and circumstances in this case the language of the Supreme Court in *Terminello* v. *Chicago*, 337 U. S. 1, 4, is appropriate:

> "Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettled effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against

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1. These rights are not absolute. Whitney v. California, 274 U.S. 357.

censorship or punishment unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest."

The posture of this case in particular is even more favorable to the defendants than was the *Edwards* case to the defendants therein, in that an injunction is involved here which prohibits the exercise of constitutionally guaranteed rights. It is a prior restraint. As the Court said in *Kunz* v. *New York*, 340 U. S. 290, 295, "We are here concerned with suppression — not punishment," and so are we here in this case. Although the protection against previous restraints on the liberties guaranteed by the First Amendment is not unlimited, it takes on an even more guarded protection than punishment after the exercise thereof. See *Near* v. *Minnesota*, 283 U. S. 697; *Kunz* v. *New York*, supra; *Hague* v. *C.I.O.*, 307 U. S. 496; *Cantwell* v. *Connecticut*, 310 U. S. 296. We find that the injunction below is an unconstitutional abridgement of the First Amendment rights, as protected by the Fourteenth Amendment, as a prior restraint on the freedom of speech.

There was no "clear and present danger" in the case at bar as there was in *Feiner* v. *New York*, *supra*. The testimony of both the Chief of Police and one of his officers was that at all times they had the crowd under control. The discontent and unrest of the local populace resulting from the unpopularity of racial integration or the offensiveness to them of Negroes organized in a movement to test out the segregation in the bus terminal, are no grounds to prohibit what otherwise would be a constitutionally guaranteed right and freedom, especially in the manner in which the defendants conducted them-

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3/ Shuttlesworth v. United States, 249 U.S. 47

selves. "A state may not suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Cantwell* v. *Connecticut*, 310 U. S. 296, 308.

Nor can it be said that the injunction should stand since it does not prohibit the peaceful use of the terminal but only that use for the purpose of "fomenting violence" in McComb, for the injunction must rest on the record made in the case; and we have already held, supra, that the findings of fact by the district court dealing with an intent to foment violence are clearly erroneous and are unsupported by any evidence. The injunction, if allowed to stand, would amount to a complete deterrent to the members of CORE to peacefully demonstrate against the segregation policies of the City of McComb. CORE and other organizations, organized for the purpose of peacefully demonstrating and speaking against unconstitutional state and local laws enforcing segregation, would then find themselves virtually inarticulate. These fundamental rights to speak, assemble, seek redress of grievances and demonstrate peacefully in pursuance thereto cannot be abridged merely because a riot might be threatened to be staged or that the police officers are afraid that breaches of the peace will occur if these rights are exercised.[9]

The grant of the preliminary injunction was a clear abuse of the discretion of the trial court. The case is therefore remanded with directions to the trial court to vacate and set aside the preliminary injunction

Judgment is REVERSED.

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9. Congress of Racial Equality may assert the constitutional rights of its members. See N.A.A.C.P. v. Alabama, 357 U.S. 449.

GEWIN, Circuit Judge, Dissenting:

This case emphasizes the wisdom of the rule that an appellate court should exercise careful and cautious restraint before substituting its judgment for that of a resident trial judge when the judgment under review relates more to the facts proven and the demeanor of the litigants and witnesses, rather than to abstract principles of law. Before stating my reasons for this dissent, I wish to make a general observation by way of preface or preamble.

Nothing said herein is intended to lend comfort or encouragement to those who advocate the use of, or who use brass knuckles and other forms of violence; or to those who undertake deliberately to provoke others to breach the peace or create violence. Trouble-makers do not solve problems. They thrive on trouble and its consequent publicity, confusion, provocation, unrest, condemnation, taunting and jeering behavior. Periods of drastic change call for magnanimous, patient and restrained conduct on the part of all elements of society, especially those who claim to be leaders. It is time for people to realize that a court is not a sovereign alchemist that can transmute violence, hate, distrust, fear, evil intent and prejudice into a rule of right conduct. People must do that themselves with encouragement and aid from the Judiciary.

The number of cases which come before the courts for review are but a handful compared with the numerous contacts and relationships which must take place from day to day amongst people with differing views and conflicting concepts. Minds that are motivated by hatred and evil motives become the repositories of wrongs and the generators of ill-mannered and shameful conduct resulting in obloquy, spoliation and hideous sufferings.

There has never been a better time than *now* for people of different origins, backgrounds and beliefs to look for and emphasize the good qualities in others; and if they refuse to do so, the poisonous infection which will result inevitably is likely to endure for generations. The human mind that is seized and saturated with hatred rarely ever wishes to part with it.

In reversing the lower court, it seems to me that the majority has failed to give proper consideration to two fundamental principles of law which are controlling and recognized by all appellate courts. These principles are:

1. Broad discretion is lodged in trial courts in the matter of issuing temporary restraining orders and preliminary injunctions. The majority has denied any discretion to the District Court and has erroneously, in my judgment, concluded that there was an abuse of discretion. It is a well established principle of law that the trial court who is present where the trouble arises, who sees and hears the witnesses, and who can sense "the feel" of the situation is far better qualified to decide such questions than an appellate court upon review of a cold record. *Howard Hay Foundation* v. *Safety Harbor Sanatorium*, 5 Cir., 1944, 145 F. 2d 661; *Burton* v. *Matanuska*, 9 Cir., 1957, 244 F. 2d 647; *Jimenez* v. *Barber*, 9 Cir., 1958, 252 F. 2d 550; *Bancroft* v. *Shelby*, 3 Cir., 1959, 268 F. 2d 569.

2. Findings of fact by the trial court are presumed to be correct and will not be set aside unless clearly erroneous. Without indulging any presumption whatever in favor of the trial court, the majority has substituted its judgment of the witnesses and the facts for the judgment of the trial court. *U. S.* v. *Dupont*, 100 L. Ed. 1273 (1955); *Peurifoy* v. *Commissioner*, 3 L. Ed. 2d 33 (1958); *Interna-*

tional Boxing Club v. *U. S.*, 3 L. Ed. 2d 279 (1959); *Horton* v. *U. S. Steel Corp.*, 5 Cir., 1961, 286 F. 2d 710. In my view, the necessary findings by the trial court are amply supported by substantial evidence; and the legal conclusions reached are well supported by the facts as found.[1]

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1. A few typical examples of errors of fact contained in the majority opinion follow:

1. *THE OPINION*:

"The evidence relative to the conduct of the CORE members was almost entirely favorable. They behaved in an 'appropriate manner,' never 'antagonistic,' never 'boisterous,' and in 'a reasonably quiet manner' according to the testimony of three of the plaintiff's witnesses."

THE RECORD:

The only time the word "antagonistic" is used relates to a time *subsequent to the issuance of the temporary restraining order*.

"Q. Now, has the situation in your opinion in McComb changed at all from what it was last week?

"A. Yes, sir.

"Q. In what way has it changed? What have you observed about the city, this week?

"A. Following the issuance of the temporary restraining order signed by Judge Mize, and when the public became aware of it, the situation cleared up tremendously.

"Q. Did members of the colored race ride a bus into McComb yesterday?

"A. Yesterday? I will have to look. Yes, sir. Yes, of course.

"Q. That would be Wednesday, this past Wednesday, the 6th of December?

"A. Yes, sir.

"Q. Were there any incidents or disturbances?

"A. No.

"Q. Were there any unusual or large crowds gathered at the bus station when the bus arrived bearing these people?

"A. There might have been up to six or eight more people than would be considered normal down there at the time.

"Q. Were they in your opinion antagonistic, or did you observe — let's put it this way, did you observe these people

There is only one appellant, a New York corporation, the Congress of Racial Equality (CORE), and the appellees are C. H. Douglas, Individually and as Mayor of the City of McComb, and Mr. and Mrs. Aubrey McGehee. There is

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that were there, these six or eight that you say would not normally be there? Did they exhibit any antagonistic motions or did they exhibit any antagonism in their voices or manner that you could observe?

"A. No, sir."

2. *THE OPINION*:

"In fact, with the exception of the one incident of demanding service by beating on the counter, the testimony disclosed the Negroes acted in no way hostile, violent or provoking. At all times they behaved in an orderly fashion."

THE RECORD:

"Mr. McGehee said that he was inside the bus station and they approached and started to the counter, to the lunch counter, and he told them, 'That is a private business not operated by the Greyhound Company and you can not use this side of it'. His words were, 'They walked through me and sat down'. He said, 'I followed them and went on the other side of the counter and told them, 'I can not serve you here. This is a private business and I can not serve you. If you will go through that door to the other side we will serve you.' He said at about that time he had to go to the south a few feet to sell a ticket and that — if you will pardon the words, the words he told me — 'all hell broke loose'."

3. *THE OPINION*:

"It was clear that the rides were publicized, but there is little evidence to indicate how the press got hold of the planned trips. One of the local CORE officials said that he knew of no planned publicity."

THE RECORD:

"Q. Mr. Mayor, in the conversation that you had with Mr. Burke Marshall in the U. S. Attorney's Office did he tell you what connection CORE, or the Congress of Racial Equality, had with these people that were coming to McComb?

"A. Not in this particular conversation that we are referring to now.

"Q. In any subsequent conversation that you had with Mr. Burke Marshall?

"A. Yes, sir.

"Q. What did he describe to you to be CORE's part in these activities?

no individual appellant — only a corporate one. Only the appellant CORE is mentioned in the injunctive order.[2] No

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"A. He told me, or his office told me, I don't know whether it was he or Mr. ———— what is the attorney with him?

"Q. Heilbord.

"A. Heilbord — if I had any suggestion to make to them, feel free to do so. And I said to him, I asked him if I could make a suggestion — now, this is Mr. Marshall — and he said yes. I said, 'If we can have these publicized movements discouraged and discontinued it will be a lot of help to us in maintaining and keeping peace and order'. And reference was made to CORE's movements, announced movements, and I said, 'If Washington will use their influence or what influence they have to discourage that it will be helpful'. He said, 'I'll do that today and call you back,' and he called me back and he said that he'd had a telephone conversation with CORE's headquarters and they had promised to *discontinue these publicized movements*. Now, that's what he said to me in a subsequent telephone conversation." (emphasis supplied)

* * * *

"Q. Tell us what the stories that were carried over the regular news media in McComb stated on Thursday with regard to the intentions, if any, of persons who had been in McComb on Wednesday to return to McComb, or particularly to the bus station or train station at McComb.

"A. The Associated Press wire service stated that the five Negroes after their return to New Orleans were engaged in meetings there, and several of them *were quoted in interviews* in which they said that they had no immediate plans at that moment but that they did plan to return." (emphasis supplied)

4. *THE OPINION*:

"CORE and other organizations, *organized for the purpose of peacefully demonstrating* and speaking against unconstitutional state and local laws enforcing segregation, would then find themselves virtually inarticulate." (emphasis supplied)

THE RECORD:

The record is totally silent. Except for motions to dismiss CORE filed nothing and proved nothing. On this point there are no allegations and no proof.

2. There is the usual provision including ". . . its officers, agents, servants, employees, attorneys and those persons acting in active concert or active participation with them who receive actual notice of this order, by personal service or otherwise."

person but CORE gave notice of appeal. Designation of contents of the record on appeal was given only by CORE. Again, we emphasize that no individual appellant is involved. In spite of this fact, the majority grounds its opinion on the following reason:

> "We find that the injunction below is an unconstitutional abridgment of the First Amendment rights as protected by the Fourteenth Amendment as a prior restraint on the freedom of speech."

This is the first instance I have found where freedom of speech on the part of a corporate defendant is used as the basis for reversing a trial court in circumstances here present. As stated, the appellant CORE filed no pleadings seeking any relief on its own behalf or on behalf of any individual it claimed to represent; and it offered no evidence. There is no suggestion of a class action or the appearance of any litigant in a representative capacity. In *Hague* v. *CIO*, 307 U.S. 496 (1938), the court held:

> "Natural persons, and they alone, are entitled to the privileges and immunities which § 1 of the Fourteenth Amendment secures for 'citizens of the United States'. Only the individual respondents may, therefore, maintain this suit."
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> * * *
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> "Since freedom of speech and freedom of assembly are rights secured to persons by the due process clause, all of the individual respondents are plainly authorized by § 1 of the Civil Rights Act of 1871 to maintain the present suit in equity to restrain infringement of their rights. As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the liberty guaranteed by the due process clause is the liberty of natural, not artificial, persons. Northwestern Nat. L. Ins. Co. v. Riggs, 203 U. S. 234, 255, 51 L.ed. 166, 173, 27 S. Ct.

126, 7 Ann. Cas. 1104; Western Turf Assoc. v. Greenberg, 204 U. S. 359, 363, 51 L. ed. 520, 522, 27 S. Ct. 384."

See also *Communist Party* v. *Control Board*, 367 U. S. 1-201 (1961); *Adams* v. *City of Park Ridge*, 293 F. 2d 585 (7 Cir., 1961); *International Ladies G.W.U.* v. *Stampfer*, 121 F. Supp. 165 (1954); The Constitution of the U. S., Corwin Ed. 1953, p. 809. The majority relies heavily on *NAACP* v. *Ala.*, 357 U. S. 449 (1958), but that case has no bearing on the issues here involved. There *NAACP* sought to protect its membership lists and affirmatively asserted such right. The court held that the Association could protect the right of anonymity of its members. The lists were in possession of the Association, and it alone could protect the privacy of them. As held by *Hague* and other cases, the right of free speech can not be asserted by an artificial person. The majority further asserts:

> "The posture of this case in particular is even more favorable to the defendants than was the *Edwards* case to the defendants therein, in that an injunction is involved here which prohibits the exercise of Constitutionally guaranteed rights."

The majority has overlooked the fact that the injunctive order relates only to one corporate defendant.

I am also at a loss to understand how the majority can make the following assertion:

> "CORE and other organizations, organized for the purpose of peacefully demonstrating and speaking against unconstitutional state and local laws enforcing segregation, would then find themselves inarticulate. These fundamental rights to speak, assemble, seek redress of grievances and demonstrate peacefully in pursuance thereto cannot be abridged merely because a riot might be threatened to be staged or

that the police officers are afraid that breaches of the peace will occur if these rights are exercised."

As pointed out in Note 3, CORE filed no responsible pleadings whatever except motions to dismiss; and it offered no evidence. The quoted assertion of the majority is the assertion of a fact unknown to the record. There is absolutely nothing in the record to show the purpose for which CORE was organized, and regardless of that fact, the record does not show that CORE conducted itself on the occasion here involved for the purpose of ". . . peacefully demonstrating and speaking . . ." against certain laws and practices. On the record before us the majority can not, with logic, proclaim the purposes of the corporate defendant and pass upon its conduct on the occasions in question when there is no evidence to support such conclusions of fact. In its erroneous view of the facts, the majority states, "The only incidence of malevolent behavior came from the white crowd milling around the terminal." Throughout the opinion, the majority varnishes the conduct of the Negroes with benevolent descriptive terms, while at the same time characterizes the conduct of the white crowd as malevolent. Such conclusions and characterizations have no foundation whatever in the record. Indeed, the majority opinion gives one the impression that nothing happened and that all was "sweetness and light" in McComb, Mississippi. Such a conclusion is contrary to the assertion of the appellant CORE in its own brief. The use of such descriptive terms

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3. The following is from the brief of CORE at page 3:

"Almost immediately thereafter, in McGehee's words, 'All hell broke out' (R. 115). The negroes were forcibly ejected from the terminal by members of the crowd (R. 85). On the following day, as a result of that incident, four residents of McComb were arrested for disturbing the peace (R. 86, 101)."

as "All hell broke out", the arrest of 4 residents of McComb for "disturbing the peace", the receipt of a telegram from the Justice Department requesting police protection, publicized movements with the presence of photographers, T. V. cameramen, and news reporters from distant cities, the presence of fists and brass knuckles, the attempt to break the window of a car, beating upon the counter and using provocative language, and other similar incidents, defy the description contained in the majority opinion.

As a matter of fact, not only were the police officers and the officials of the City of McComb alerted and disturbed, the record clearly shows that they were informed of the impending actions by agents of the F.B.I.[4] The

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"On the same day, after receiving a telegram from the Justice Department (R. 218) requesting police protection at the terminal, the Selectmen of the city authorized the police to patrol the terminal on a regular basis (R. 103-4, 209).

"On Friday a field representative of CORE met the 1:30 bus from New Orleans (R. 175) and picked up a group of five Negro passengers (R. 178) without incident (R. 178-9). The negroes returned to New Orleans on the 3:30 bus (R. 185).

"On Saturday, December 2d, the field representative of CORE met negro passengers, all natives of McComb (R. 182), who had arrived from Jackson, Mississippi. The negroes left the bus and used the terminal without incident (R. 187) but as they entered the auto of the CORE representative a crowd that had gathered beat the auto with fists and brass knuckles, kicked the sides and attempted to break the window of the car (R. 188). A police officer intervened and the beating stopped (R. 188)."

4. The following is from the record, pp. 204-5 and 206-8:

"Q. On Tuesday evening, November 28, 1961, did you receive a telephone call from any member of the Federal Bureau of Investigation?

"A. I did.

"Q. Who was that man who called you?

"A. Jack Quigley.

"Q. Speak up a little.

"A. Mr. Jack Quigley.

local officers were also confronted with a restraining order issued on November 27, 1961, by a three judge court which resulted in some reluctance on the part of such officers to exercise any authority whatever. This feeling of restraint necessitated a call from these officials to the Justice Department in order to obtain advice and perhaps permission, as to what local police officers would be permitted to do. Indeed, the situation was discussed

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"Q. And what did he tell you on that occasion?

"A. He informed me that CORE was planning another ride for the next day to McComb.

"Q. Now, you say another ride. This would have actually been the first one?

"A. The first ride to McComb.

"Q. This would have been for the next day, which would have been a Wednesday, is that right, sir?

"A. Correct.

"Q. Now, on Wednesday did a group of people come into the McComb—a group of colored people come into the McComb bus terminal from New Orleans?

"A. They did.

"Q. Was this in accordance with your information from Mr. Quigley?

"A. Yes, sir."

. . . .

"Q. Was Mr. Quigley at that time in McComb, Mississippi?

"A. Yes, sir, he had arrived in McComb.

"Q. At any time during the day of Wednesday, the 29th of November, 1961, did Mr. Quigley contact you with any message as to the intent or intentions of this group of persons?

"A. Yes, sir, he did.

"BY MR. RACHLIN: I wish to clarify the question

"BY THE COURT: Let me get that question again.

(The reporter read the last question and the last answer)

"BY MR. CLARK: If Your Honor please, I am again emphasizing to you that it is not my purpose by this question to prove what these intentions were, but simply to prove the fact that this police officer received a communication on that day from another police officer and what that communication was.

"BY THE COURT: I overrule the objection.

"BY MR. CLARK (Continuing)

by the local officers and Honorable Burke Marshall, Assistant Attorney General, Chief of the Civil Rights Sec-

"Q. Did he contact you and tell you what these persons planned to do?

"A. He did.

"Q. What did he tell you that they planned to do?

"A. He told me that he had been in contact with these people that came in on the bus and their intentions were to go to the bus station at 3:20 or 3:25 and catch the 3:30 bus out of McComb.

"Q. All right, sir. Now, while Mr. Quigley was there in your office, or in the City Hall where your office is located, do you know whether any of these persons did come to the bus station?

"A. I did not know at that time.

"Q. What was the first indication that you had that they were at the bus station, these five colored persons that had come in that morning?

"A. Mr. Quigley came back to my office, he called me out in the hall and told me that there had been a fight at the bus station, that I had better get down there and see about it.

"Q. All right, sir, now, what time was it that Mr. Quigley told you that?

"A. Shortly after three o'clock.

"Q. And then did you go and investigate the fight?

"A. I did.

"Q. What did that investigation disclose to you as to whether or not these five persons had come back about thirty minutes before they told you they were coming?

"A. When I arrived on the scene all the persons involved—

"Q. When you were told that they were coming.

"A. —they had gone, and I immediately tried to find them. I looked all afternoon and it was six o'clock that afternoon before I did find them.

"Q. Did you find those persons to be the same five colored people that rode in from New Orleans?

"A. They were, yes, sir.

"Q. So it was your investigation that morning from the Federal Bureau of Investigation that they would not be at the bus station until 3:25?

"A. That's correct.

"Q. But apparently they did not go there at that time?

"A. They apparently jumped the gun. That's what they did."

tion of the Department of Justice. The following telegram was in evidence:

> "In confirmation of our telephone conversation this morning you may be assured that the court order of November 27 does not in any way prohibit police action to protect persons using the bus terminals affected by the order. In our opinion the police of McComb are not only free but have a duty to take whatever steps are necessary, including the patrolling of the premises and the dispersal of crowds. The order and the Federal law contemplate that the police will provide the same protection to persons using the facilities of the bus terminals as is given to other citizens in the city. They may do so by any preventive or other means which do not have the purpose or effect of coercing racial segregation or interfering with the exercise of the rights protected by the order. You may be assured of our desire to cooperate and to be of assistance to the city in any way that we can in order to protect the safety of interstate travelers and to permit peaceful compliance with the order of the court and the law.
> Burke Marshall Asst Atty Gen Civil Rights Dic."

The majority has held that notwithstanding the testimony about hell breaking loose, fisticuffs and boisterous conduct; the presence of the F.B.I. who alerted local police officers of coming events; a telephone conversation between local police officers and the Justice Department; and a telegram from the Justice Department, there was yet no evidence to support a reasonable inference that violence and public disturbance provoking a breach of the peace were involved. This conclusion is reached by the majority in the face of the fact that two experienced U. S. District Judges[5] had acted, one granting a tempo-

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5. Judge Mize issued a temporary restraining order on the 2nd day of December, 1961; and Judge Cox issued a preliminary injunction on the 22nd day of December, 1961.

rary restraining order and the other a preliminary injunction.

If the situation had gotten out of hand; if the local police officers had refused to act; if the resident U. S. District Judges had refused to grant relief; the evidence indicates that people would have been injured and property would have been destroyed; in which event there would have been a hue and cry, no doubt; that local officers did not believe in "law and order", and wilfully refused to perform their duty.

The majority places great emphasis on the case of *Edwards v. South Carolina*, 9 L. Ed. 2d 697, but the opinion has misconstrued that decision. In the Edwards case the court was careful to point out:

> "There was no evidence to suggest that these onlookers were anything but curious and no evidence at all of any threatening remarks, hostile gestures or offensive language on the part of any member of the crowd."

In the instant case, both groups, Negro and White, were more than curious; there were threatening remarks, hostile gestures and offensive language. If not, why the concern of the F.B.I. and the Chief of the Civil Rights Section of the Justice Department in Washington, D. C.?

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6. As shown by the testimony of witness Gordon:

"Q. If this temporary restraining order is removed do you think that burden—do you believe as the police commissioner that that burden will return to the police force?

"A. If the temporary restraining order is removed and these people come back in to visit that bus station *chaos will result*. (emphasis supplied)

"Q. Do you believe that it will place a burden on your police force in McComb?

"A. An intolerable burden."

7. The record is replete with incidents of violence and potential explosive situations among which are the following:

Finally, the only order before us for review is one enjoining a corporate defendant ": . . . from sponsoring, encouraging or financing persons to utilize the terminal facilities . . . for the purpose of fomenting violence or provoking breaches of the peace in or near said terminal facilities; or for such purpose after having publicized their purposes and intentions to so utilize or misuse such facilities; or for the purpose of creating or securing unto themselves notoriety and publicity, as the sponsoring organization of such fomentation and provocation; or for the purpose of testing the tempers and reactions of the local citizens of said City in the absence of local police protection."[8] Expressly excluded from the operation of

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In response to a question concerning the investigation made of a disturbance on Wednesday, the first day that the CORE members came in, the police commissioner of McComb testified:

"They disclosed that a photographer had been taking pictures in the vicinity of the bus station all day and that about 2:00 o'clock p.m. he was in the vicinity of the bus station, he was questioned and a fight developed between him and one or more persons also there."

Police Chief George Guy testified to 5 negroes being beaten and ejected from the bus terminal on Wednesday at a time when the police department was investigating the photographer fracas above mentioned.

Witness McGehee testified that one of the 5 negroes who were ejected beat upon the counter of the bus terminal restaurant with a knife and in a loud provocative voice demanded: "Why in the hell can't we get service in here?"

The police chief testified that four men were arrested and charged with assault and battery on Thursday in connection with the fight in the bus station on Wednesday.

On Friday, a photographer was seen being chased through town:

". . . I did observe a man running pell mell northward carrying a camera in his hand with a crowd of people chasing him on both sides of the street. I did also observe various, many repeated assemblies in small groups of people during the day."

8. Although the majority considers it of no importance, it is a fact that the F.B.I. informed the Chief of Police of the City of McComb that these Negroes would return at 3:20, but actually they came 30 minutes early, and arrived before the police

the injunction is "... any impingement upon the *normal, usual or ordinary travel* of any person in *interstate* or *intrastate* commerce to, through or from the City of McComb, Mississippi." (emphasis supplied). Only unlawful conduct is enjoined — normal conduct is guaranteed by the order.

I would AFFIRM."

A true copy.

Test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeals, Fifth Circuit
(Seal) By /s/ G. J. Ganuchean
Deputy

New Orleans, Louisiana, June 26, 1963.

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9. There is evidence in the record that the facilities formerly used by white persons had been used by negroes for months without incident until the occurrence of the events under review:

"Q. Over what period of time have you noticed colored persons entering into the west side or what was *formerly designated as the white waiting room in the terminal there*? How long had this been going on? (emphasis supplied)

"A. Mr. Clark, I don't believe I can answer your question, it has been quite a while.

"Q. Could you give me some general estimate as to whether it has been in the term of months or years?

"A. I had rather say months, but I can't be sure about that. I had rather say months.

"Q. Have you ever seen violence as a result of colored people coming into that terminal?

"A. No, none.

"Q. Has there been any publicity about these former visitors in this white side of the waiting room, or what used to be the white side of the waiting room?

"A. No, sir.

"Q. So that prior to this time there have been colored people in there without incident?

"A. Yes, sir. I'm thinking, or my judgment is that we were notified that those people were coming there as agitators. This was what I have learned later, that they notified the people that they were coming there as agitators and to create a disturbance, which I think they have done. They did it up brown."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 3223

DOUGLAS, ET AL,
PLAINTIFFS

vs.

THE CONGRESS OF RACIAL EQUALITY, INC., ET AL,
DEFENDANTS

The Plaintiffs in this case sued for an injunction to restrain the Defendants from conduct designed and intended to provoke breaches of the peace at a bus terminal in McComb. A temporary restraining order was granted the Plaintiffs by Honorable Sidney C. Mize, United States District Judge, Southern District of Mississippi. That restraining order was extended by the writer due to the fact that business of the court prevented earlier examination and study of the briefs of the parties considered by them applicable to this case. The Defendants filed four motions which have been separately disposed of by the Court. The conflicting contentions about the nature and character of this case seems to account for the conflicting viewpoints. This case does not in anywise or to any extent conflict with United States of America v. The City of McComb, et al, No. 3215, or anything done by the Court in that proceeding. Nobody denies or even questions in this case the right of any of these Defendants to the free and unrestricted use of all facilities at the bus terminal, or their presence at, in, or near the terminal. This proceeding assails the asserted right of these Defendants to

deliberately provoke and incite acts of violence on and against them at this terminal and in this municipality. It is the conduct of the Defendant and its associates which is calculated and intended and deliberately done to disturb the tranquility and disrupt business in this municipality that is the object of this proceeding to restrain. The Plaintiffs are here seeking a temporary injunction against such wrongful acts of the Defendants. The case is here on verified complaint with supporting affidavit. No answer was filed by the Defendants thereto. The Plaintiffs put on oral testimony before the Court in additional support of said application. At the conclusion of such testimony of the Plaintiffs, the Defendants rested. Accordingly, the Court makes its findings of fact and conclusions of law based thereon.

FINDINGS OF FACT.

The Plaintiff C. H. Douglas is Mayor of the City of McComb. He sues in this case individually and in his said official capacity. Aubrey McGehee, et ux, operated the restaurant in the Greyhound Bus terminal until it was closed as a result of acts of violence deliberately fomented and sponsored with the active assistance of The Congress of Racial Equality, Inc. This Defendant is charged with "sponsoring, financing, and encouraging John Doe and Mary Doe and others to come into the City of McComb City, after publicizing their intentions so to do, in order to foment violence and to provoke breaches of the peace in and around the terminals, etc." The testimony and the reasonable inferences therefrom lead the Court to such inescapable conclusion and such is found to be the facts on this hearing. Several people, composing what The Congress of Racial Equality called a "project", publicized their arrival at this terminal. Their goings and comings were so widely advertised as a challenge to the

entire community that it was covered by news media from Jackson and even ones outside this State. They came to McComb for the avowed purpose announced in advance of testing the tempers of the community which upon arrival they deliberately set about to provoke; and to incite disturbances and violence upon themselves as a part of their desired and intended goal.

Colored people in their good faith pursuit of proper business activities have used all of the white facilities in this terminal during the past several months without notice or incident or objection thereto. But the provocative acts and conduct of the members of these projects of the Defendant from Louisiana have caused violence. Significantly, there has been no violence of any kind since the restraining order in this case although the Court understands that law abiding citizens of both races are enjoying every right and privilege accorded them without any discrimination whatsoever. The Defendant heatedly contends that it has the vested right to continue to hurl its chailenges and taunt and tantalize this community in this fashion. It may not have been unlawful per se for the rude female mercenary to shout at the restaurant operator to know "why in the hell he did not give her service," but her acts under the circumstances as a member of this project of the Defendants were deliberately done to provoke others to attack her and thus engage in violence and breaches of the peace in violation of the ordinances of the City of McComb and the statutes of the State of Mississippi. That kind of misconduct on the part of any person or corporation cannot be tolerated in any organized society and civilized community. It certainly finds no protection in any guaranty accorded any such agitators by the Constitution of the United States as they claim. This unwarranted activity of this Defendant placed

an unlawful burden upon that community through the agitators in these projects of the Defendant and the evidence shows that such activities will continue unless enjoined. These missions of the Defendant are not designed or intended in the public interest but are done for the sole purpose of disturbing the domestic tranquility of the community for its own financial gain. The Court further finds that it has jurisdiction of the parties and the subject matter and that the jurisdictional amount necessary to give this Court jurisdiction of this case is as stated in good faith in the Complaint and that the attack on the jurisdiction of the Court lacks factual support and is without merit.

CONCLUSIONS OF LAW.

No right of any person to the free and unrestricted use and enjoyment of all fully integrated facilities at the McComb terminal is in anywise involved in this suit. The right of every person regardless of color is accorded full recognition and respect herein but it is the duty of this Court to see that the rights of others and particularly the community are not violated by organized agitators. Any person can travel for any lawful purpose and use any facility at any terminal but that is not the problem before this Court in this case. The right to use and enjoy these facilities carries with it a corresponding duty to behave themselves while doing so. Even the well-recognized constitutional right of free speech does not accord an irresponsible person the right to wrongfully holler "Fire" in a crowded theatre. That announcement has been one of the classics of jurisprudence in this Nation.

There is presented to this Court more than the mere probability for the necessity and the propriety of injunctive relief to this community from these projects of this Defendant

It is the considered judgment and opinion of this Court that the Plaintiffs are entitled to process of this Court to enjoin such continued course of wrongful conduct and misbehavior on the part of The Congress of Racial Equality, Inc., and its associates and the conduct of its program of "projects" being sent into McComb for provocative purposes for its financial gain and to the hurt of the Plaintiffs. An order accordingly may be presented for entry.

This December 22, A. D., 1961.

United States District Judge.

Office-Supreme Court, U.S.
FILED
AUG 21 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 301

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi,

Petitioners,

vs.

THE CONGRESS OF RACIAL EQUALITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. .....

C. H. Douglas; Mrs. Aubrey McGehee, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. Gordon Burt, Jr., Mayor of the City of McComb City, Mississippi,

Petitioners,

vs.

The Congress of Racial Equality,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court for the Southern District of Mississippi are appended to the petition. The opinion of the Court of Appeals for the Fifth Circuit, together with the dissenting opinions, is reported in __ F. 2d __, and is appended to the petition.

JURISDICTION

The jurisdictional requisites are adequately stated in the petition.

STATEMENT OF FACTS

On Monday, November 27, 1961, a preliminary injunction was issued by a statutory three-judge Court, sitting in the Southern District of Mississippi. 6 Race Rel. Rep. 1161. The order generally enjoined the Mayor and Selectmen of McComb City from interfering in any way with compliance by the Greyhound Corporation with the laws of the United States and the regulations of the Interstate Commerce Commission prohibiting racial discrimination in the facilities of interstate commerce (R. 23, 27, 36).

On Tuesday, November 28th, "White Only" signs were removed from the bus terminal (R. 93).

On the same day, the Chief of Police of McComb City learned from an agent of the Federal Bureau of Investigation that negro members of Congress of Racial Equality (hereinafter "CORE") would visit the city on the following day (R. 204-8). The next morning, when a group of five negroes arrived by bus at the depot a large crowd had already gathered (R. 71, 73, 77, 136). On that occasion, police were not present in the bus station (R. 127).

The negroes found the bus terminal restaurant closed presumably because of a gas leak (R. 73). The group left, but returned shortly after 3 P.M. (R. 207). They entered the terminal and went to the "white" lunch counter, sat and requested service from Aubrey McGehee, co-appellee and lessee of the restaurant facilities (R. 140). Mr. McGehee testified he had never served colored people before, nor had any "white" restaurant in McComb (R. 142, 148).

McGehee's testimony indicated that he informed the group that his restaurant was . . . "not connected with

Greyhound", and that if they would go to the "colored part . . . a woman of your color will serve you anything you want over there" (R. 140-1). He also stated that one of the women in the group asked belligerently why they couldn't "get service here" (R. 141, 144). There was no testimony as to any other belligerent conduct (R. 74).

Almost immediately thereafter, in McGehee's words, "all hell broke out" (R. 115). The negroes were forcibly ejected from the terminal by members of the crowd (R. 85). There was testimony that if the police had been present, they could have prevented the incident (R. 209-210). On the following day, as a result of that incident, four residents of McComb were arrested for "disturbing the peace" (R. 86, 101).

The same day, after receiving a telegram from the Justice Department (R. 218) requesting police protection at the terminal, the Selectmen of the city authorized the police to patrol the terminal on a regular basis (R. 103-4, 209).

On Friday a field representative of CORE met the 1:30 bus from New Orleans (R. 175) and picked up a group of five negro passengers (R. 178) without incident (R. 178-9). The negroes returned to New Orleans on the 3:30 bus (R. 185).

On Saturday, December 2nd, the field representative of CORE met negro passengers, all natives of McComb (R. 182) who had arrived from Jackson, Mississippi. The negroes left the bus and used the terminal without incident (R. 187), and in a quiet manner (R. 206) but as they entered the auto of the CORE representative a crowd that had gathered beat the auto with fists and brass knuckles,

kicked the sides and attempted to break the window of the car (R. 188). A police officer intervened and the beating stopped (R. 188).

On the same day a complaint by the City of McComb and Mr. and Mrs. Aubrey McGehee was filed against CORE and John and Mary Doe as defendants (R. 2). A temporary restraining order was signed by District Court Judge Mize (R. 46) and after a hearing before Judge Harold Cox, a preliminary injunction was issued on December 22nd, 1961 (R. 242) enjoining defendant CORE and its officers, agents, servants, employees and attorneys, from "sponsoring, encouraging or financing persons to use the terminal facilities located in the city of McComb City * * * for the purpose of fomenting violence or provoking breaches of the peace in or near said terminal facilities" (R. 245). On appeal, the Court of Appeals for the Fifth Circuit reversed, and it is the latter judgment of which petitioners seek review in this Court.

QUESTIONS PRESENTED

a. Does a peaceful use of interstate bus facilities by small groups of members of Congress of Racial Equality present a clear and present danger of disturbance of the peace?

b. Is an injunction against a peaceful use of interstate bus facilities a prior restraint on freedom of speech?

c. May Congress of Racial Equality assert the rights of freedom of speech and assembly?

d. Did the Court of Appeals apply the proper scope of review of the facts in holding that in order to reverse, it must find that the trial court abused its discretion?

ARGUMENT

This petition for certiorari is one more dilatory tactic by the City of McComb, Mississippi, in a campaign to delay giving Congress of Racial Equality and its members the right freely to use interstate bus facilities at McComb. The "questions presented" are hardly questions at all; the allegations of law are without substance. The use of the bus facilities at McComb was completely peaceful on the part of members of CORE, there was no danger of any kind from CORE, let alone "clear and present" danger. The injunction was more than a simple interference with speech, it was a prior restraint of speech, as evidenced by the simple fact that members of CORE have not been in the McComb bus station since 1961. The assertion that CORE has no right of freedom of speech or assembly is contrary to all the decisions on the point in this Court. Finally, the statement that the court below applied the wrong standard of review is astonishing, since that court applied a standard laid down by this Court, and indistinguishable from the standard advocated in the petition herein.

No Substantial Question of First Amendment Rights Is Presented

There are no issues presented by this case with regard to the right of freedom of speech and assembly which have not been settled by previous decisions of this Court, as correctly interpreted by the Court of Appeals below.

a. There Is No Issue of Clear and Present Danger

The Court of Appeals correctly concluded that the decision in *Edwards v. South Carolina*, 372 U. S. 229 (1963)

controls this case. Here, as in that case, persons, in this case members of CORE, were assembled for purposes of a peaceful protest against segregation. In this case, as in that, a crowd had gathered to watch and possibly to interfere. In this case, as in that, the testimony was that the police, whenever they were present, were always able to control the crowd. This case differs from the *Edwards* case, if at all, only in the fact that in this case there was some little violence *against the defendants* on two occasions: on Wednesday, November 29, 1961, when negroes were ejected from the bus terminal by the crowd, and on Saturday, December 2, 1961 when the crowd attacked the car in which the protesting negroes were sitting. In the first case, there was testimony that the police could have prevented the violence if they had been present (R. 209), and in the second case they actually did disperse the crowd (R. 188). The mere fact that there has been a disturbance is not enough to justify interference by injunction, if the defendants have not caused or incited the disturbance. In *Terminiello v. City of Chicago*, 337 U. S. 1 (1949), the defendant had made a speech which caused a disturbance because of the violent opposition to it. This court reversed his conviction for disorderly conduct, saying:

> "Accordingly, a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and pre-conceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, Chaplinsky v. N. H.,

> pp. 571-72, is nevertheless protected against censorship or punishment unless shown likely to produce a clear and present danger of serious substantive evil that rises far above public inconvenience, annoyance or unrest." 337 U. S. at 4.

To argue otherwise is to deny the existence of free trade in ideas, the very basis of freedom of speech.

The Court of Appeals correctly ruled that there was no incitement to riot by the protest, as there was in the case of *Feiner v. New York*, 340 U. S. 315 (1951). Petitioners seem to argue (Petition p. 15) that publicity given to the use of the bus facilities by members of CORE would be tantamount to inciting to riot, but it is unnecessary to reach that question, because the Court of Appeals found that there was no showing on the record that CORE did publicize the protest (R. 66-71), or "widely advertise" it, as charged in the findings of fact of the trial court. The Court of Appeals said further:

> "* * * In any event, regardless of what the findings were with respect to the publicity, it is clear that, whatever part of the injunction is based on 'advertising' of the comings and goings of CORE, the injunction must be struck down. The publicity, even if provided originally by CORE, could only be said to be a part of their peaceful efforts to demonstrate. Any violence from the local citizenry which comes from this can only be said to be based on the offensiveness to them of CORE's intention to use McComb's facilities on an integrated basis, and their right to publicize their intentions is no less protected than their carrying them out." (Petition p. A16)

b. There Is No Question That the Injunction Is a Prior Restraint on Freedom of Speech

The petitioners argue that the Court of Appeals was in error in finding the temporary injunction a prior restraint on freedom of speech because the basis of the injunction, if any there be, was common law and Federal equity power, rather than statute. Petitioners attempt to distinguish *Thomas* v. *Collins*, 323 U. S. 516 (1945), in which this Court held a temporary restraining order to be a prior restraint on freedom of speech, on the ground that the order in that case was based on a statute. This is a useless distinction; in *Thomas* v. *Collins*, *supra* this court found a prior restraint on freedom of speech in the terms of the restraining order itself, though the statute might have been constitutional if properly applied. 323 U. S. at 528-529. In *Near* v. *Minnesota*, 283 U. S. 697, 714 (1931), this Court, in outlining the history of the rule against prior restraints on freedom of speech showed that prior restraints first arose when the courts enjoined libel *in the absence of statute*. If the reports are not replete with decisions on injunctions against speech issued pursuant to general equity power rather than pursuant to statute, it is because there has been no such distinction since the very inception of the rule against prior restraints on freedom of speech.

c. There Is No Question as to the Right of the Congress of Racial Equality to Raise an Issue of Freedom of Speech

The Court of Appeals held correctly that CORE might raise the Constitutional rights of its members under the decision of this court in *N. A. A. C. P.* v. *Alabama*, 357

U. S. 449 (1958).* This position has been consistently maintained by this court in that and other decisions. *N. A. A. C. P. v. Button*, 371 U. S. 415, 428 (1963); *Louisiana v. N. A. A. C. P.*, 366 U. S. 293, 296 (1961), and it has further been held that an organization such as CORE, which is directly engaged in activities of speech and assembly, may assert the right on its own behalf. *N. A. A. C. P. v. Button*, 371 U. S. 415, 428 (1963); *Grosjean v. American Press Co.*, 297 U. S. 233, 244 (1936). If the rule were as the petition states it (Petition p. 23), no incorporated publication or moving picture company could assert the right. Cf. *Kingsley International Pictures Corp. v. Regents of Univ. of New York*, 360 U. S. 684 (1959).

The quotation cited in the petition in support of this proposition (which is characterized as a statement of "this court"), is actually an extract from a separate opinion of Justice Stone, in which Justice Reed concurred, in *Hague v. C. I. O.*, 307 U. S. 496, 527 (1938), which states only that a corporation may not assert freedom of speech under the Privileges and Immunities Clause of the Fourteenth Amendment, because it is not a "citizen". It is not disputed that freedom of speech may be asserted under the Due Process Clause of the same amendment, see *Grosjean v. American Press Co.*, 297 U. S. 233, 244 (1936), and

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* This action was originally brought against "Congress of Racial Equality, John Doe and Mary Doe." It is plain, then, that petitioners originally intended this action to run against individuals, members of CORE, as well as against the organization. This step of the facts cannot be changed now by drawing the petition herein against CORE alone.

it is perfectly clear that the Court of Appeals did not base its opinion on the privileges and immunities clause, but on the Fourteenth Amendment generally.

There Is No Question That the Court Below Applied a Correct Standard of Review

Petitioners argue that the Court of Appeals determined the facts *de novo*, a procedure which is alleged to be improper on an appeal from a preliminary injunction. Yet the Court of Appeals stated the standard of review for this case in nearly the same terms that the petition has advocated:

> "Since this is an appeal from a preliminary injunction, and not a final ruling after a full hearing on the merits, we must review the district court's injunction on the narrow question of whether that court abused or improvidently exercised its discretion. * * *" (p. A9 of Petition)

This is the standard laid down by this Court in *Alabama v. United States*, 279 U. S. 229, 230 (1929); thus it seems that everyone, the petitioners, the Congress of Racial Equality, and this Court, is really in agreement as to the standard for review of facts by an appeals court. Surely there is no need for further review by this Court of such well-established principles.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No.

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi,

Petitioners

vs.

THE CONGRESS OF RACIAL EQUALITY,

Respondent.

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No.

C. H. DOUGLAS; MRS. AUBREY McGEHEE, Individually and As Representative of Her Deceased Husband, Aubrey McGehee; and R. GORDON BURT, JR., Mayor of the City of McComb City, Mississippi,
Petitioners,

vs.

THE CONGRESS OF RACIAL EQUALITY,
Respondent.

REPLY TO BRIEF FOR RESPONDENT IN OPPOSITION

INTRODUCTORY STATEMENT

This reply is necessitated by the gross inaccuracy of some of Respondent's statements, but more especially by the necessity for a correct consideration of Respondent's claimed standing in this case. If Respondent's contentions be allowed to stand it can safely be predicted the litigation load on Federal Courts will increase tremendously. The

few short minutes necessary to consider this reply, and if necessary to reconsider action taken on this petition, may be worth untold hours to future judicial administration.

I THE CORPORATION CORE HAS NO STANDING TO BRING THIS SUIT

(A) CORE Has No Standing to Assert the Constitutional Rights of Other Persons Not Parties to This Litigation.

This is not a class action. It is a suit in which a corporation asks:

> "May Congress of Racial Equality (a New York corporation) assert the rights of freedom of speech and assembly?" (Reply page 4)

If this Court has not answered that question point blank by stating:

> "As to the American Civil Liberties Union, which is a corporation, it cannot be said to be deprived of the civil rights of freedom of speech and of assembly, for the *liberty* guaranteed by the due process clause is the liberty of natural, not artificial, persons." *Hague* v. *C.I.O.*, 307 U.S. 496, 527. (Emphasis supplied)

then the English language is incapable of definite expression.

The identical privileges and immunities here claimed were there involved—freedom of speech and assembly. The decision is authoritative precedent which the Court of Appeals has not properly heeded. Respondent's attempted aspersion to the effect that this point was only made in concurring opinions does not detract from the vitality of this authority. The assertion of that right was

one of the points in issue and the rights of the corporate party were finally denied by this court on that precise premise.

In a footnote to its majority opinion in this case, the Fifth Circuit stated:

> "Congress of Racial Equality may assert the constitutional rights of its members. See *NAACP* v. *Alabama*, 357 U.S. 449."

This authority (the only one cited on this point) is entirely inappropriate to permit CORE to litigate this case.

> In *NAACP* v. *Alabama*, 357 U.S. 449, this Court stated: "To limit the breadth of issues which must be dealt with in particular litigation, this Court has generally insisted that parties rely only on constitutional rights which are personal to themselves. Tileston v. Ullman, 318 U.S. 44, 63 S. Ct. 493, 87 L. Ed. 603; Robertson and Kirkham, Jurisdiction of the Supreme Court (1951 ed.), § 298. This rule is related to the broader doctrine that constitutional adjudication should where possible be avoided. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346-348, 56 S. Ct. 466, 482-483, 80 L. Ed. 688 (concurring opinion). *The principle is not disrespected where constitutional rights of persons who are not immediately before the Court could not be effectively vindicated except through an appropriate representative before the Court.*
>
> "If petitioner's rank-and-file members are constitutionally entitled to withhold their connection with the Association despite the production order, it is manifest that this right is properly assertable by the Association. *To require that it be claimed by the members themselves would result in nullification of the right at the very moment of its assertion.*" (Emphasis supplied.)

Bates v. City of Little Rock, 361 U.S. 516, and *Louisiana v. NAACP*, 366 U.S. 293, are almost identical in legal import and fact content to the *Alabama* case.

Respondent also cites *NAACP v. Button*, 371 U.S. 415. The statement in that case to the effect that a corporation may assert the privileges and immunities of individual citizens *must* be considered in the light of the citations supporting that statement. All of the cases there cited deal with situations where *only* the corporation was capable of effectively asserting the privilege involved. If the individual persons in those cited cases had attempted to assert the privilege claimed, that very act would have defeated it. *It is not so here.*

McCabe v. A. T. & S. F. Ry. Co., 235 U.S. 151, is another authority which illuminates the need for certiorari. It negated the right of a litigant to sue on behalf of other non-parties where the persons suing had suffered no deprivation of the rights asserted. The reasoning is certainly sound. If such were not the rule, the amount of litigation would mount astronomically. For this and the very salutary reasons discussed in *NAACP v. Alabama, supra*, this rule should not be abrogated here where no showing whatever is made that Respondent Corporation must protect the asserted right or see it fail. Any natural person who claimed any personal constitutional immunity or privilege had been abridged by the Court's order here could certainly have appealed.

(B) CORE Has No Standing to Assert the Right of Free Speech and Assembly in Its Own Behalf.

In an attempt to support its standing to prosecute the appeal in its own right, the Respondent Corporation has placed its principal reliance upon *Grosjean v. American*

Press Co., 297 U.S. 233, which held a unique state tax, unlike anything ever imposed on newspapers in the previous history of all of the United States, amounted to a calculated device in the guise of a tax to limit the circulation of certain newspapers. The Court held that the corporation had a *proprietary* standing to assert that the confiscation of their *property* violated their right to equal protection and due process of law. Freedom of the press is included in the express terms of the First Amendment and is thus brought under the ambit of 14th Amendment protection from state encroachment. The vital distinction is that there the Corporate Respondent's *own property rights* were there in jeopardy not liberty or privileges or immunities. The Court was careful in *Grosjean* to recognize that:

> "A corporation, we have held, is not a 'citizen' within the meaning of the privileges and immunities clause (of the 14th Amendment)."

Contrary to the position of the publishing companies in the *Grosjean* case, the corporation, which is Respondent here, can only contend that it is entitled to assert privileges and immunities which it does not have and is incapable of having or enjoying.

Since *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357, this Court has consistently held that the fictitious legal entity called a corporation is not a "citizen" within the meaning of the privileges and immunities clause of the 14th Amendment to the Constitution. It cannot assemble. It cannot speak. The fact that it is a "person" capable of owning and dealing with *property* and possessed of rights to equal protection of its *property* and due process of law as respects its *rights of property* within the framework of the same amendment, does not modify or detract from these holdings in the slightest.

Respondent also cites *NAACP* v. *Button* in support of its claim to standing to assert a "right" of its own to free speech and assembly. We respectfully submit the Court should most carefully consider the authority cited in the *Button* Case to support the statement that NAACP had a direct standing to test the constitutionality of a statute which curtailed a primary business purpose of that corporation, to wit: urging individual citizens to pursue legal recourse as parties, *for the protection of the rights of such individuals.*

If the Court does not limit this holding to the import of the *Grosjean* case upon which *Button* relied, it will, in our opinion, open a veritable Pandora's Box. It is difficult to imagine how many lawsuits a corporation might bring if it could sue every time it thought *someone else* might need to go to court.

Assuming *arguendo* that the record showed the purpose of CORE's incorporation, which it does not, and so assuming further that one of the reasons Respondent was incorporated was for the purpose of instituting law suits to vindicate the constitutional rights of individual citizens, it would be a complete non-sequitur to hold that by its own act of incorporation it could thus *create a right in itself* which would enable it to circumvent this Court's long standing and salutary policy of permitting litigation only by those whose rights are directly affected, except only where a representative is the sole efficient means of preserving the rights of such non-parties.

It at once becomes apparent that a contrary holding would create a vast amount of litigation *on both sides* of civil rights issues and *on both sides of* numerous other areas of litigation in today's high-pressure group action world. If a pressure group can create a right to litigate

for others by the simple expediency of incorporating to do so, it is difficult to imagine how many cases the corporation would litigate that would never otherwise be filed: the very volume of which would be damaging to sound judicial administration (and no doubt would frequently damage the rights of those who are involuntarily or unknowingly brought before the court).

REPLY TO RESPONDENT'S STATEMENTS

Respondent states:

> "This petition for certiorari is *one more dilatory tactic* by the City of McComb, Mississippi, in a campaign to delay giving Congress of Racial Equality and its members the right freely to use interstate bus facilities at McComb." (Emphasis supplied) (page 5).

This statement is false. The record before this Court clearly demonstrates that petitioners did not even *apply* to this Court or to the Court below for a stay pending a ruling on this petition. The mandate of the Court of Appeals has been filed in the District Court since June 10, 1963, and that Court's injunction has long ago ended.

The statement was always false. The District Court's Preliminary Injunction expressly excluded ". . . any impingement upon the normal, usual or ordinary travel of any person in interstate or intrastate commerce to, through or from the City of McComb, Mississippi." The only conduct ever enjoined was that which was designed to foment violence and provoke breaches of the peace. This is an obvious attempt to divert the court's attention from the fact that this is *not* a segregation controversy, but a very basic peace-keeping issue which is not unique to McComb or its bus terminal. (Cf. this court's own regulations, 40 U.S.C., § 13j.)

Respondent states:

> "The injunction was more than a simple interference with speech, it was a prior restraint of speech, as evidenced by *the simple fact that members of CORE have not been in the McComb bus station since 1961.*" (Emphasis supplied) (page 5)

and also alleges that it is:

> ". . . directly engaged in activities of speech and assembly." (page 9)

Respondent must now realize the absence of record support in this case for the decision of the Court of Appeals and thus chooses to interject matters wholly outside the proof made. If this "simple fact" had the least relevancy it was easily capable of proof, which the Respondent did not choose to make. The record is likewise completely silent as to the purpose of the Respondent's corporate existence or its activities. (See footnote 1, Judge Gewin's dissent, Appendix to Petition, A. 26.)

In a footnote the Corporate Respondent states:

> "This action was originally brought against 'Congress of Racial Equality, John Doe and Mary Doe.' It is plain, then, that petitioners originally intended this action to run against individuals, members of CORE, as well as against the organization. This state of the facts cannot be changed now by *drawing the petition herein against CORE alone.*" (Emphasis supplied) (page 9)

The short answer to this position is that *only the corporation, CORE,* was enjoined: *Only the corporation* appealed. *Only the corporation* is respondent here.

CONCLUSION

This is no mere technicality. We respectfully submit that, in conflict with the decisions of this court, the Fifth Circuit has now so extended an exception to a salutary rule limiting litigation that it has, in practical effect, abolished the rule itself. If this is not corrected it will inevitably have a tremendous impact on already burdened court calendars. It is bound to provoke numerous constitutional controversies contrary to the announced determination of this Court to avoid such adjudications where possible. Certiorari should be granted.

Respectfully submitted,

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